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DRAFT CONVENTION ON ASSIGNMENT [IN RECEIVABLES FINANCING] [OF RECEIVABLES IN INTERNATIONAL TRADE]

Compilation of comments by Governments

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INTRODUCTION

1. At its thirty-first session, held in Vienna from 11 to 22 October 1999, the Working Group on International Contract Practices adopted the draft Convention on Assignment [in Receivables Financing] [of Receivables in International Trade] and requested the Secretariat to transmit the draft Convention to all States and interested international organizations for comments. With a view to assisting delegates in finalizing the draft Convention at the thirty-third session of the Commission, to be held in New York from 12 June to 7 July 2000, the Working Group also requested the Secretariat to prepare an analytical compilation of those comments (A/CN.9/466, para. 215)

2. This note sets forth, with minimal editorial modifications, the first comments received from Governments. Any further comments will, upon receipt by the Secretariat, be included in an addendum to this note.

COMPILATION OF COMMENTS

CZECH REPUBLIC

[Original: English]

I. GENERAL COMMENTS

We highly appreciate all activities and work done by the UNCITRAL with a view to increasing the availability of lower-cost credit in assignments of receivables in international trade. In our country, legal regulation of assignments of receivables is very general. Nevertheless, it differs in some aspects from the draft Convention.

Our most serious concern relates to articles 11 and 12 of the draft Convention. Under Czech law, it is not possible to assign a receivable contrary to an agreement between the assignor and the debtor. Any assignment effected by violation of such an agreement is null and void. The same problem arises in relation to article 5, variant A.

In addition, we are concerned about articles 15 and 17, which leave the notification of the debtor to the discretion of the assignor or the assignee. Under Czech law, the assignor is obliged to notify the debtor without undue delay. Another concern relates to article 21, which permits waivers of future defences and rights of set-off. Under our national law, such a waiver is null and void.

II. SPECIFIC COMMENTS

Title and preamble

We have no particular preference with regard to the title and the preamble. We do not object to the deletion of article 6 (c), as long as the preamble contains an indicative list of practices to be covered by the draft Convention.

Scope of chapter V (article 1 (3))

We agree with the retention of article 1 (3).

Exclusion or special treatment of certain practices (article 5)

We support the exclusion of practices relating to the assignment of financial receivables from the scope of articles 11 and 12, as proposed in A/CN.9/466, para. 71. In article 5, for the reasons mentioned above, we would prefer variant B.

"Location" (article 6 (i))

We agree with the definition reflected in A/CN.9/466, para. 96. The proposal in A/CN.9/466, para. 99, as to branch offices of financial service providers is also acceptable to us.

Application of the annex (article 40)

As to article 40, we prefer the second set of bracketed language.

Effects of declarations on third parties (article 41 (5))

We agree with the proposed wording in square brackets.

III. CONCLUSION

In conclusion, we have to state that, due to the divergences between our national legal system and the draft Convention mentioned above, at this stage, the Czech Republic will not be able to adopt the draft Convention, since this would require a change in our Civil or Commercial Code. At this stage, the harmonization of our law with the law of the European Union is a matter of higher priority for our country.

While we recognize the practical significance of practices to be covered by the draft Convention, we would note that they are rather new in the Czech Republic (developed in the last eight years) and they relate to a small part of the market (although, one of the reasons for this situation is the lack of sufficient legislation).

For this reason, we are very interested in the draft Convention and we hope to have the opportunity to adopt it in the future.

DENMARK

[Original: English]

I. GENERAL COMMENTS

Generally, Denmark appreciates and welcomes the preparation of the UNCITRAL draft Convention on Assignment [in Receivables Financing] [of Receivables in International Trade] ("the draft Convention"). Furthermore, Denmark finds that, if adopted in a sufficient number of States, the draft Convention could lead to an improvement of the possibilities of obtaining credit by assignments of receivables.

II. SPECIFIC COMMENTS

Denmark wishes to make the following comments with respect to articles 1 (3), 6 (i), 24, 25 (2), 26 and 36.

Scope of chapter V (article 1 (3))

In order to indicate the importance of regulation of the international private law, in particular on priorityquestions, chapter V should be retained as a part of the draft Convention with an opt-out possibility (see A/CN.9/WG.II/WP.104, pages 37-38; and A/CN.9/466, para. 148).

"Location" (article 6 (i))

In order to establish certainty and transparency, the place of business, to which the contract has its closest connection, should be considered as the connecting factor in the definition of the term "location" in article 6 (i) (see A/CN.9/466, para. 96, variant A, and paras. 25-30). Such a place of business is visible to third parties, while the place of "central administration" or the "center of main interests" is not always obvious and predictable for third parties, who need to know which law will apply to a future assignment. Furthermore, regardless of which connecting factor is chosen, the connecting factor should be clearly explained in the commentary on the draft Convention, so as to facilitate its understanding.

Change of location of the assignor and law applicable to priority (article 24)

While a change in the location of the assignor will probably not take place often, we would suggest that the Commission considers whether a provision dealing with a change in that location is needed (e.g. similar to the regulation in article 9 of the U.S. Uniform Commercial Code).

Super-priority rights (article 25 (2))

Article 25 (2) of the draft Convention deals with claims which according to local insolvency law are entitled to super-priority (i.e. priority over an assignee). Article 24 leaves priority to the law of the assignor, thus ensuring that an assignee can rely solely on the law of the assignor's location and calculate its risk, including the risk of any super-priority claims.

However, as an exemption to article 24, article 25 (2) preserves super-priority claims under an insolvency law other than the law of the assignor's location (in practice, the law of the debtor). As a result, in order to evaluate the risk of any super-priority claims, the assignee has to examine both the law of the assignor's and the debtor's location. This result may lead to higher transaction costs.

It would not be appropriate to delete article 25 (2), since such an approach may bring the draft Convention in conflict with the European Union draft Insolvency Regulation (articles 2 (g), 4 and 28). However, the Commission may wish to consider limiting the scope of article 25 (2) to cases where the insolvency proceedings with respect to the assignor are opened in a State in which the assignor has an establishment. Such an approach might reduce the assignee's risk without conflicting with the draft Insolvency Regulation and should be sufficient in protecting the interests of local creditors.

Furthermore, regardless of whether the scope of article 25 (2) is limited as suggested, the Commission may wish to consider making the declaration of any super-priority rights, which can be invoked in a secondary insolvency proceeding, mandatory. Such an approach would, at least, make a discovery of non-assignor law easier for the assignee. If States agree that lower transaction costs would improve access to credit, a duty to declare super-priority rights should not render the draft Convention unacceptable.

Meaning of proceeds (article 26)

In order to limit possible conflicts with national law on secured credit in assets other than receivables and to avoid addressing the complexities of re-perfection of security interests in proceeds, the Commission may wish to consider limiting the scope of article 26 to cash proceeds (e.g. money, checks, deposit accounts). This result could be obtained by defining proceeds in article 6 (k) as cash proceeds only. In such a case, the last sentence of article 6 (k), referring to returned goods, would be unnecessary and could be deleted.

Conflicts with other international texts (article 36)

According to article 36, the draft Convention does not prevail over other international agreements dealing with matters governed by the draft Convention. If the goal is to obtain a uniform approach, which would ensure the largest degree of predictability, the approach followed in article 36 may not be appropriate. For example, it would be uncertain to what degree article 12 of the Rome Convention deals with the matters governed by the draft Convention, and, if it does, which text would prevail (the Rome Convention contains a similar provision). In a comment to the draft Convention, it is stated that the conflicts between the Rome Convention and the draft Convention are minimal and that the prevailing view is that the Rome Convention does not deal with priority aspects (A/CN.9/466, para. 193). However, it should be noted that there exists national case law in Europe which seems to assume that the Rome Convention in fact deals with the law applicable to priority issues. While it may be argued that the draft Convention prevails since it is a substantive law text (A/CN.9/466, para. 194), this argument may not be fully correct, since, with regard to priority issues, the draft Convention (chapter IV, sec. III and chapter V, article 30) is in fact, to a large extent, a private international law text.

Consequently, in order to minimize the legal uncertainties arising from conflicting international agreements, it may be more appropriate if the draft Convention were to prevail over other texts, with the exception of texts listed in a declaration (A/CN.9/466, para. 192) and, perhaps, texts dealing with rights in receivables arising from the sale and lease of aircraft (A/CN.9/466, para. 83). Alternatively, the Commission could consider providing that the draft Convention would not prevail over other texts, with the exception of texts listed in a declaration. If article 36 is not revised, the commentary to the draft Convention should include explicit comments about conflicts with existing international agreements.

FRANCE

[Original: French]

Title of the draft Convention

France proposes the formulation "Convention on Assignment of Receivables in International Trade", which it feels is more in harmony with the vast scope of the text.

Non-contractual receivables (article 2 (a))

Article 2 (a) refers to the "assignor's contractual right to payment of a monetary sum", a formulation which has the effect of excluding non-contractual receivables from the scope of application of the draft Convention. France would like to see non-contractual receivables covered by the draft Convention, at the very least, through the introduction of an optional system.

Limitations on receivables other than trade receivables (article 5)

The draft Convention intends to allow assignment of receivables even in circumstances where the agreement concluded between the assignor and the debtor contains an anti-assignment clause (article 11). A provision of this kind is incompatible with the global set-off mechanisms, which are applicable to reciprocal debts and receivables and on which all framework agreements that regulate operations on financial markets are based.1/

The Working Group on International Contract Practices put aside the idea of excluding financial receivables, defined as receivables other than trade receivables, from the scope of application of the draft Convention on the grounds that such an exclusion would have unduly curtailed the scope of the draft Convention. In fact, however, such a broad exclusion is not necessary, since the only receivables that might give rise to problems are those covered by a set-off mechanism and not all financial receivables in general.

Therefore, since it seems that financial receivables are to remain within the scope of the draft Convention, we must, at least, find a solution to ensure that the anti-assignment clauses necessary for the proper operation of framework set-off agreements retain their effectiveness. As it happens, the use of such framework agreemenst is encouraged by central banks and bank supervisory authorities because of their positive impact on the management of bank risks.

In A/CN.9/466, two solutions are proposed for article 5, "Limitations on receivables other than trade receivables", one proposed by the delegation of the United States of America (variant A) and the other proposed by the delegation of Canada (variant B). Variant A would validate an assignment as between the assignor and the assignee, but not as against the debtor, unless the debtor consented to the assignment. Variant B would leave the validity of an assignment, made in violation of an anti-assignment clause, to other law (which could treat such an assignment as invalid).

In principle, variant B is simpler than variant A, because it avoids the complications that would result from making a distinction between effect as between the parties and effect with regard to third parties, a distinction on which variant A is based. Furthermore, both variants are intended to apply to assignments of "receivables other than trade receivables" and reference is made to the definition of trade receivables in article 6 (l).

Article 6 (l) (which is still bracketed in the Working Group's report) defines the term "trade receivable" as "a receivable arising under an original contract for the sale or lease of goods or the provision of services other than financial services". Yet, as we have explained above, not all receivables arising from

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1/ This applies, for example, to the "Global Master Repurchase Agreement" of the Public Securities Association and the International Securities Market Association, the "Master Agreement" of the International Swaps and Derivatives Association, the "European Master Agreement" of the Banking Federation of the European Union, the "Framework Convention of the French Bankers Association relating to Repurchase Transactions", the "Framework Convention of the French Bankers Association relating to Forward Transactions", and the Framework Agreements of the German Bankers Association on Repurchase Transactions and on Forward Transactions.

financial-service contracts justify an exclusion from the scope of the draft Convention, but only those that are governed by a set-off agreement.

Accordingly, whether we retain variant B or variant A, it would be wise to formulate the definition of "trade receivable" in such a way that the scope of the exception introduced in article 5 would be limited to what is really necessary. One might, for example, suggest the following formulation in article 6 (l):

> "'trade receivable' means a receivable arising under an original contract for the sale or lease of goods or the provision of services other than financial services when these latter are provided within the framework of an agreement that provides for set-off of all reciprocal debts and receivables of the parties".

Examples of such financial services (pensions, swaps, payment services, etc.) could usefully be given in the commentary, which the UNCITRAL Secretariat will be preparing on the draft Convention.

Definition of location (article 6 (i))

The French Government is in favour of the definition of location in article 6 (i). However, it wishes to observe that this is problematic if the mechanism for assignment of receivables laid down in the draft Convention is to be used for refinancing branches of banks. The objective is, after all, to define the assignor's location, if it has more than one establishment, as the State in which its central administration is located. In particular, the location of the assignor would determine the priority rules to which the assignee's rights would be subject.

In practice, the definition in article 6 (i) would mean, in connection with an assignment of receivables between, for example, the Bank of France (as assignee) and a Paris branch of a foreign bank (as assignor), that the location of the assignor would be the State of its central administration, that is, the State where the headquarters of the foreign bank is located. The assignment of receivables would thus be subject to the law of that State, notably with regard to the applicable priority rules. Such a result would be completely unacceptable for the refinancing bank, whether it were a central bank or some other credit institution.

If we want to avoid seriously hampering the application of the draft Convention for purposes of inter-bank refinancing, a special regime must be found for branches of banks. A system of this kind would be all the more justified as bank branches are subject to the same obligations, notably with regard to consent, as banks which are legal entities under local law, subject, of course, to the special arrangements resulting from the "European passport". Even if the prudential supervision of banks remains within the competence of the authorities in the country where the bank's headquarters are located, responsibility for the provision of liquidity (i.e. refinancing) still belongs, even within the European framework, with the authorities of the host country (see article 14-2 of EEC directive No. 89/646, known as the second directive on coordination of bank legislation).

The special regime, of which we have been speaking, might consist of placing bank branches in the same category as the debtor, for which the relevant place of business is that "which has the closest relationship to the original contract" (subparagraph (iii)).

Application of the annex to conflicts of priority among competing assignees (articles 1 (4), 24 and 40)

It will be very difficult to make an instrument operate well, if several parallel priority rules may be applicable to a conflict of priority between several assignees who obtain the receivables from the same assignor. For example, if an assignment has priority under the law of State A, which has opted for sections I and II of the annex (registration), and another assignment has priority under the law of State B, in which the assignor is located and which has opted for the priority rules in section III of the annex (time of the contract of assignment), it is not clear whether the conflict before a court in State A will be resolved in conformity with section I and II, or with section III of the annex.

It seems obvious that a court in a State, in which the assignor is located and which is a Contracting State, should apply the criteria of article 1 (1) (a) in determining whether the draft Convention, including article 24, applies. However, the text of the draft Convention is not sufficiently clear about this matter. Article 40, concerning the application of the annex, confines itself to indicating that "A Contracting State may ... declare that [it will be bound either by sections I and/or II or by section III of the annex to this Convention]". Paragraph (2) of article 40 stipulates that, for the purposes of article 24 (which governs the law applicable to competing rights of other parties), the law of a Contracting State that has made a declaration is the set of rules set forth in either section I of the annex or in section III. Article 1 (4) provides that the annex applies in a Contracting State which has made a declaration under article 40. It is, therefore, proposed that article 1 (4) should be amended as follows: "The annex to this Convention applies to the assignments referred to in a declaration made under article 40 by the Contracting State in which the assignor is located."

Consumer protection (articles 17 to 23)

With the exception of articles 21 and 23, the provisions in section II of chapter IV of the draft Convention do not go far enough in protecting the rights of consumer debtors. The Working Group decided that assignments to consumers are not excluded from the scope of the draft Convention, unless they are made for consumer purposes. It is, therefore, essential that the legal position of a consumer, whose debt to a bank results from a loan, secured by either movable or immovable property, or from an overdraft facility or from the use of a credit card, should not be affected by the instrument we are preparing. In this connection, the arguments developed in A/CN.9/WG.II/WP.106, para. 58, are valid not only for articles 21 and 23 but for all the articles in this section, since in France, as in many other countries, national law protects consumers in all those situations envisaged by the draft Convention, and most of these provisions of national law are mandatory law provisions.

Generally speaking, consumers, as debtors protected by law, cannot accept renunciation by contract of provisions reflecting public policy (e.g., French law No. 78-23 of 10 January 1978 on consumer credit). Moreover, the consumer is protected against unfair clauses, which the professional might be tempted to propose to him, by a Community Directive (No. 93/13 of 5 April 1993) and by French law (article L 132-I of the Consumer Code, together with an annex comprising clauses considered to be unfair; and recommendations of the Commission on Unfair Clauses, notably the recommendation concerning clauses of implicit consent and the summing-up recommendation). Moreover, article 19, which provides that, when the debtor receives notification of the assignment, it only has to make payment to the assignee, should not apply to consumer debtors. Law No. 88-1201 of 23 December 1988 on Common Receivables Funds provides that the assignor remains obliged, apart from any guarantee obligation, to collect the receivables assigned (article 36) or to entrust collection on an obligatory basis to some other French credit institution or to the Bank for Official Deposits, advising the debtor of that action.

Consequently, France wants all the articles in this section II of chapter IV concerning the debtor to be "without prejudice to the laws of the State of location of the debtor concerning protection of the latter in transactions for personal, family or household purposes".

Coordination with the Unidroit draft Convention concerning interests in mobile equipment (article 36)

With regard to the relationship between the UNCITRAL draft Convention and the Unidroit draft Convention, it should be pointed out that article 36, which seems to apply the principle of "*lex specialis derogat legi generali*", does not seem to offer an appropriate means of settling a potential conflict between the two instruments in the event that the chapter on assignment of interests is maintained in the Unidroit draft Convention.

Chapter IX of the Unidroit draft Convention deals in effect with assignments of international interests. While, in most legal systems, a security is generally considered to be accessory to the receivable that is secured, in the system, proposed under the Unidroit draft Convention, the receivable constitutes the accessory security. The approach taken by in the UNCITRAL draft Convention is altogether different [under article 12, the security right follows the secured obligation]. The UNCITRAL draft Convention deals with assignments of receivables in international trade and international assignments of receivables.

Let us recall that this question is to be considered at the next joint session of Unidroit and ICAO (Rome, 20 to 31 March 2000), which is to draft a convention on interests in mobile equipment, and that a working document on this subject prepared by the French delegation, which presents different options, is to be discussed. We, therefore, consider it preferable to await the results of the discussions, to be held under the aegis of Unidroit and ICAO, before trying to arrive at a final decision on this question within the framework of UNCITRAL, since the very existence of this chapter in the Unidroit draft Convention on assignments of interests is still contested.

GERMANY

[Original: English, German]

I. GENERAL COMMENTS

The German Government supports the objectives pursued with the UNCITRAL draft Convention on Assignment in Receivables Financing. Different national regulations on the requirements for effective assignments, on the status of the assignor, the assignee and the debtor, as well as different national regulations on the possibilities for global assignments and on the assignment of future receivables limit the cross-border use of receivables for financing purposes. It seems to be necessary to remove legal uncertainties without disturbing existing financial practices.

The German Government welcomes the progress achieved to date on the ongoing UNCITRAL project, but notes that certain essential problems have not been resolved yet.

II. SPECIFIC COMMENTS

Scope of application/receivables other than trade receivables

The Working Group originally recommended a rather broad scope of application for the draft Convention. The German delegation supported this approach. During the discussion of specific provisions, however, it became clear that due to the particular nature of certain receivables, an unlimited scope of application would be unsuitable. This is the case with receivables from financial futures, loans on collateral securities, sale and repurchase schemes, and receivables processed through clearing systems.

Financial futures, loans on collateral securities, and sale and repurchase schemes are in practice concluded under master agreements. The aim of such agreements, in the event of non-performance or the insolvency of one of the parties, is to make possible the unitary termination and settlement (so-called "netting")2/ of all individual transactions. The master agreement restricts in particular any right which the insolvency administrator may have to make selective decisions. Thus, it is no longer possible for the insolvency administrator to fulfil individual (from the point of view of the insolvent debtor's assets as a whole) valuable

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2/ The "mechanics" of netting can be described as follows: the individual transactions concluded within the framework of the general agreement constitute, together with the master agreement, one unitary obligation. Notice may only be given with respect to all transactions as a whole and only in certain cases (e.g., in the event of failure to make payment, of insolvency, of a worsening of the financial standing due to reorganization). It is not possible to give notice with respect to individual transactions. Where a general agreement is cancelled, all individual transactions are terminated. The reciprocal claims which arise as a result of this (e.g., for payment of money or delivery of securities) are reimbursed through a unitary settlement claim. The amount of the settlement claim is calculated on the basis of the current market values of the individual transactions. To the extent that positive and negative current market values are balanced against one another, these cancel each other out.

transactions while terminating others (so-called "cherry-picking"). In order to secure the objective of the general agreement (i.e. the reduction of risks and the exclusion of "cherry-picking") or rather, to protect it from circumvention, master agreements, typically used in Germany and internationally, make provision that the assignment of receivables, arising from the individual transactions included in the agreement, made by one party requires the prior (written) consent of the counter-party.3/

The above-explained "mechanics" of the termination and settlement as a whole can also be found in clearing systems which make provision for multilateral netting of the payments made through the system. The objective is the same as the one with respect to financial futures, loans on collateral securities, and sale and repurchase schemes, whereby within the framework of reducing risks, alongside the risks of insolvency, settlement risks are the most important consideration. In addition, all agreements on multilateral netting make provision for a limitation of assignability.

The German Government is of the opinion that established practices should not be hindered by the UNCITRAL draft Convention, and that a special regulation for the transactions concerned should, therefore, be introduced, either through a corresponding limitation of the scope of application of the draft Convention (solution of exclusion) or in the form of exemption of the relationship between debtor and assignor from the scope of certain provisions of the draft Convention (special-treatment solution).

In view of the recommendation of the Working Group to make the scope of application as broad as possible, it seems that it would not be possible to come to an agreement on the solution of exclusion. Within the framework of a special-treatment solution, which would in any case be necessary, a concept should be created which is transparent and easy to apply in practice. With respect to this consideration, the approach of excluding the above-mentioned receivables from the applicability of articles 11 and 12 of the Convention, where assignment prohibitions exist between the parties, would seem to be appropriate.

In any case, acceptance of such an approach will depend on whether the receivables to be covered by the special-treatment solution can be clearly identified. To this extent, recourse to the term "trade receivables" would appear to be problematic, particularly due to its reference to "financial services", since there is no uniform interpretation of the term under the different legal systems. Against this background, receivables resulting from financial futures, loans on collateral securities, and sale and repurchase schemes, as well as receivables which are processed through clearing systems, should be defined with due consideration to international practice (for example, the definitions in customary standard master agreements used internationally).

"Location" (article 6 (i))

The term "location" is of central importance for the draft Convention, not only with respect to the scope of application but also with respect to certain provisions of debtor protection and certain private international law rules. To date, it has not been possible for the Working Group to come to an agreement on the definition of the term "location".

3/ Cf. for example section 7 of the ISDA Master Agreement 1992 as well as No. 10 of the German general agreement for financial futures. This requirement for consent is referred to hereafter as "assignment prohibition".

The German Government is of the opinion that the definition of the term "location" must be unequivocal, clear, always identifiable and do justice to the actual legal situation. Doubts exist with respect to article 6 (i) to the extent that it makes no distinction between head office and branch office. Only such a distinction will be able to take account of both European and international business practice, in which banks, in particular, are often active in foreign countries, not through subsidiaries, but through dependent branch offices.

If the provisions on the scope of application and on the relevant conflict-of-laws rules merely refer to the head office, one arrives at the unacceptable result that transactions which are made through foreign branch offices are subject to the legal order of the head office, although the head office does not have any relation to the specific assignment in question.

For the above-mentioned reason, at the thirty-first session of the Working Group, it was suggested that reference be made to the location of the branch in the books of which a receivable appears immediately prior to an assignment. There are significant objections with respect to this proposal. At the point in time an assignment takes place, often the location, where the receivable is booked, cannot be determined. In addition, in an age of electronic media, the location of a book entry can often only be determined with difficulty; and, in the case of registers held transnationally, book entries may relate to receivables of branch offices in different countries.

Other issues of private international law (chapter V)

Provisions relating to private international law should be placed at the end in chapter V, if possible, and not in different places in the draft Convention. Accordingly, article 26 and the brackets around article 30 should be deleted. The Commission may need to examine whether the special public policy provision in article 30 (2) could also be deleted, since article 32 contains a general clause pertaining to public policy. Article 31 (2) is detrimental to legal certainty, since the meaning of the term "close connection" is vague and can be subject to debate. In this connection, the question arises whether one could not dispense with this provision as well.

Conflicts with other international agreements (article 36)

With respect to the issues addressed in article 36, it should be noted that the Member States of the European Union have to pay regard to the fact that they are, under international law, already bound by article 12 of the Convention of 19 June 1980 on the Law Applicable to Contractual Obligations. In addition, it should be noted that legal instruments of the European Union (regulations and directives) of higher priority within the field of private international law (on the basis of articles 61 ff. of the Treaty on European Union in the version of the Treaty of Amsterdam) would not be affected by the draft Convention. In view of the above and of the complexity of article 36, the second half of that article may need to be deleted.

Furthermore, article 36 seems to create doubtful consequences for State Parties to the Ottawa Convention on International Factoring. According to the rule of speciality and notwithstanding its narrow scope of application, the Ottawa Convention might preempt the UNCITRAL draft Convention. As a result,

States parties to the Ottawa Convention would be entitled to make a reservation to the rule validating assignments made in violation of contractual limitations (article 18 of the Ottawa Convention). With respect to factoring contracts outside the Ottawa Convention but within the scope of the UNCITRAL draft Convention, only the latter one is applicable. The non-applicability of the Ottawa Convention may be attributed to the specific nature of the contract, but it may also be attributed to the geographic sphere of application of the Ottawa Convention which is different from the geographic sphere of application of the UNCITRAL draft Convention. Even if the objectives of those Conventions do not differ, the provisions of the UNCITRAL draft Conventions are more comprehensive and contain more substantive law. Beyond that, the requirements for the assertion of claims are determined differently and the two conventions set out different regulations on assignment prohibition.

Similar problems will occur under the Unidroit/ICAO draft Convention on International Interests in Mobile Equipment and the Protocol on Matters Specific to Aircraft Equipment. An expert working group within the Unidroit/ICAO project will convene in early March this year. The German Government expects this group to present a solution to be acceptable for both projects.

LITHUANIA

[Original: English]

Title of the draft Convention

The title of the Convention should be "Convention on Assignment of Receivables in International Trade".

Exclusion of assignments for consumer purposes (article 4 (a))

It would be more precise to state in article 4 (a) that the draft Convention is not applicable where the claim arising from the consumer contract is transferred to a consumer.

Treatment of receivables other than trade receivables (article 5)

Variant B of article 5 would be preferable.

Party autonomy (article 7)

The scope of article 7 seems to be doubtful. We think that the limitation to the principle of party autonomy should apply only with respect to the mandatory provisions of the draft Convention. For example, according to its content, article 13 should be regarded as a mandatory norm. Therefore, the parties should not be allowed to set it aside. The draft Convention contains further provisions of a mandatory nature which the parties should not have the right to derogate from. The draft Convention may become meaningless, if parties are able to introduce different rules than those of the mandatory provisions of the draft Convention.

Thus, a reservation should be made in article 7 enabling parties to establish by agreement other rights and obligations, except in cases where the draft Convention determines the rights and obligations of the parties by way of a mandatory norm.

Time of assignment (article 10)

Article 10 of the draft Convention refers to the time of the conclusion of the contract of assignment. However, the time when a contract is deemed to be concluded is defined differently in the national legislation of various States. Therefore, it would be preferable to determine in the draft Convention the time when a contract of assignment is deemed to be concluded.

Contractual limitations on assignment (article 11)

Article 11 (1) is inconsistent with basic principles of Contract Law. Where the parties agree that the creditor will not relinquish the claim, such agreement is considered to be binding. A derogation from this principle might be possible only in relation to some specific contracts, like the factoring contract. However, it should not be established as a general rule applicable to all contracts. Article 11 (1) ignores a completely reasonable and legitimate interest of a debtor to deal with a specific creditor.

Principle of debtor protection (article 17)

In article 17, it would be useful to provide for the compensation of any expenses incurred by the debtor as a result of any alteration of the payment instructions.

Conflicts of priority (article 24)

The need for article 24 is doubtful. The purpose of the draft Convention is to unify the material law but not private international law. Therefore, the regulation of the issues of applicable law is hardly justifiable. Private international law issues could be decided within the framework of the Hague Conference on Private International Law.

Public policy exceptions (article 25)

Article 25 restricts significantly the possibility of applying the *lex fori*. We think that the draft Convention should allow the forum to set aside a rule of the law applicable law if that rule is manifestly contrary, not only to the public policy of the forum, but also to mandatory norms of the *lex fori*.

Private international law provisions (chapter V)

We believe that chapter V should be omitted and the issues of the applicable law should be regulated by means of some other convention, since the draft Convention aims at the unification of material law but not of private international law and, in any case, under article 37 States may declare that they are not bound by chapter V.

Exceptions as to sovereign receivables (article 39)

Article 39 and other articles provide States with numerous possibilities for derogating from the application of one or more articles of the draft Convention. Such a wide possibility for derogation might reduce the effect of the draft Convention.

PERU

[Original: Spanish]

Title of the draft Convention

The most appropriate title of the Convention is: "Convention on Assignment of Receivables in International Trade".

Scope of application (articles 1 and 5)

In view of article 5, article 1, which establishes the scope of application, should specify that the draft Convention will apply only to trade receivables or, more precisely, to receivables arising from international commercial transactions.

"Future receivable" (article 6 (b))

In article 6, the concept of "future receivable" should be covered by a separate subparagraph, in the same way as other terms defined in article 6.

"Location" (article 6 (i))

Article 6 (i) should specify that it relates to the domicile of the persons involved in the assignment. In certain articles, for example articles 23, 24, 25 and 30, reference is made to "location". It should be specified that the concept being dealt with here is that of "domicile".

"Parts of receivables" (article 9)

Article 9 refers to "parts" of receivables. This term would need to be defined in article 6.

Form requirements relating to the creation of rights securing receivables (article 12 (5))

Article 12 (5) needs to be clarified, since it gives the impression that the provisions of the draft Convention will prevail over those of domestic law. In Peru, for example, mortgages and non-possessory liens or judicial liens need to be publicly registered, which in turn calls for certain formalities to be observed.

Defences and rights of set-off of the debtor (article 20)

Paragraph (3) refers [in the Spanish version] to article 10, whereas the reference should be to article 11.

Modification of the original contract (article 22)

Paragraph (1) is confusing. There appears to have been an error in the drafting since it states that an agreement concluded before notification of the assignment is effective, whereas such an agreement ought not to be effective. Subparagraph (2) (b) refers to a "reasonable" assignee, but it would be more appropriate to refer to a "diligent" assignee.

Law applicable to the relationship between the assignor and the assignee (article 28)

The provision set forth in article 28 (2) departs from the corresponding rule of private international law which is contained in the Peruvian Civil Code. According to the latter rule, if the applicable law is not chosen by the parties, the law of the place of performance of the contract is applicable or, if the contract is to be performed in different countries, the applicable law is that which governs the principal obligation or, if that cannot be determined, the law of the place where the contract was concluded. This comment also concerns articles 29 and 30, except as regards creditors of the assignor and the insolvency administrator, whose rights and obligations are regulated by a separate legal regime. This comment and that made with respect to article 12 (5) are qualified by articles 37 and 38, which make it possible for a State to declare, at its own discretion, that it will not be bound by those provisions.

REPUBLIC OF KOREA

[Original: English]

I. GENERAL COMMENTS

Korea considers that an international convention that aims to improve assignability of receivables in international transactions will enhance international trade and finance by making credit available at lower cost. Korea, therefore, supports the draft Convention that is currently discussed in the United Nations Commission on International Trade Law, provided that the draft Convention is effective in improving assignability of receivables and that it duly protects the rights of the parties affected by the assignment. While recognizing the economic objective of the draft Convention, Korea also notes that the rules on assignments of receivables have social and political implications which deserve serious considerations. In addition, Korea wishes to emphasize that certain domestic rules on the assignment of receivables are an integral part of the domestic legal system that cannot accommodate drastic changes. With these general observations, Korea wishes to make specific comments on the following issues.

II. SPECIFIC COMMENTS

The title, the preamble and the definition of receivables financing in article 6 (c)

Korea does not consider it necessary to limit the scope of the draft Convention to assignments in receivables financing. Korea is of the view that the draft Convention should apply generally to the assignment of receivables in international trade. Therefore, the title should reflect this idea, eliminating the term "financing" and replacing it with the words "international trade". The formulation of the preamble should be also aligned with this change. Consequently, Korea does not consider that the definition of receivables financing is necessary in the draft Convention.

Scope of chapter V (article 1 (3))

Korea considers that the scope of chapter V should be consistent with the scope of the draft Convention. Therefore, chapter V should apply to "assignments of international receivables and to international assignments of receivables as defined in chapter I."

Practices relating to the assignment of financial receivables (article 5) and practices relating to the assignment of receivables arising from the sale or lease of aircraft and similar types of mobile equipment (article 36)

It is inappropriate to apply the draft Convention to certain financial transactions that are technically assignments of receivables but are not intended to provide credit (e.g. repurchase and swap transactions). The application of the draft Convention to those types of assignments will only interfere with the established practices and create confusion. Therefore, those transactions should be excluded entirely from the scope of application of the draft Convention.

The draft Convention should not include any rule referring explicitly to the assignment of receivables arising from the sale or lease of aircraft and similar types of mobile equipment to be covered by the preliminary draft Convention, currently prepared in the context of UNIDROIT. Korea is of the view that the relationship between those two Conventions should be left to be decided in accordance with the rules of international law. Any provision on the relationship between those texts, which is consistent with the rules of

international law, would be redundant, while a provision, which would be inconsistent with the rules of international law, would only create a conflict.

"Location" (article 6 (i))

The definition of "location" should be clear. At the same time, the definition should also designate a certain place as the location where the relevant transaction is actually agreed upon and takes place. Therefore, Korea can accept the place of business as the location. If the assignor or the assignee has more than one place of business, Korea proposes that the place of business is that which has the closest relationship to the original contract. Korea further proposes that the place of central administration is presumed to be such place in the absence of proof to the contrary. This proposition would provide a clear reference to "location" and would also accommodate a range of exceptional cases where transactions are agreed upon locally at a branch level, as is often the case with banking transactions.

Application of the annex to the draft Convention (article 40)

Korea prefers to provide for the application of the annex in line with the second bracketed proposal in article 40, since this proposal better clarifies the various options for States.

Other exclusions and effects of declarations (articles 39, 41 (5), 43 (3) and 45 (3))

Korea supports strongly the adoption of article 39, which allows States to exclude further practices from the application of the draft Convention. Financial systems of States are in significantly different stages of development. Certain financial practices are also considerably different from State to State. In addition, the fast development in the area of finance may make the application of the draft Convention to certain types of assignments of receivables inappropriate. Therefore, a State may find it inevitable to exclude certain practices from the application of the draft Convention. This indicates that the safety net provided by article 39 is essential. With respect to the effect of declarations, Korea wishes to adopt all bracketed proposals in articles 41, 43, and 44 of A/CN.9/466, Annex 1 with the rest of the provisions in those articles.

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New York, 12 June - 7 July 2000

DRAFT CONVENTION ON ASSIGNMENT [IN RECEIVABLES FINANCING] [OF RECEIVABLES IN INTERNATIONAL TRADE]

Compilation of comments by Governments and international organizations

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States

SWITZERLAND

[Original: English]

I. GENERAL COMMENTS

We have the honour to revert to the note of the Secretary-General of the United Nations dated 29 November 1999 concerning the draft Convention on Assignment of Receivables. We welcome the opportunity to comment on the draft Convention, noting with satisfaction that the Working Group on International Contract Practices of UNCITRAL has accomplished an impressive piece of work. In particular, it can be expected that the draft Convention will remove obstacles to cross-border receivables financing and thus will facilitate such transactions. The draft Convention has been met with favourable initial reactions from the marketplace, indicating that the uniform rules correspond to practical needs.

We also observe that the draft Convention deals with all aspects of cross-border assignments in a comprehensive manner. We note, however, that the lack of a rule dealing with the form of an assignment could have a seriously disruptive effect on international trade practices. We are well aware that the issue has been discussed at great length, without the Working Group being able to reach a compromise. However, in view of the relative importance of the issue, we welcome any suggestion to address the issue, including suggestions to introduce options for Contracting States to choose from (such options could range from no form to written form requirements).

We shall limit our comments to the issues yet to be resolved at the Commission session as listed by the Secretary-General in the above-mentioned note.

Title/Preamble

With respect to the title, good arguments are put forward for the three options, but none of them is without shortcomings. It is essential to choose a title which relates to the broad scope of the draft Convention in international commercial assignments. The title should avoid to give the impression that important practices are excluded. We would, therefore, prefer a title which avoids any appearance that the scope of the draft Convention could be limited to assignments in receivables financing only and could read along the following lines: "Convention on Assignment of Receivables".

It is nevertheless desirable that attention is drawn to one of the most important aims of the draft Convention, namely to facilitate credit through receivables financing. The place to do this is the preamble and possibly also the commentary on the draft Convention. Thus, we prefer to retain the references to receivables financing in the preamble, including the examples for practices of receivables financing given in the third paragraph. Furthermore, language relating to this important aspect might be added in the commentary.

The term "receivables financing" is no longer used in the normative parts of the Convention, that is, all parts other than the Preamble. Hence, the respective definition in article 6 (c) should be deleted.

Scope of chapter V (article 1 (3))

The need for and the scope of chapter V on private international law has been the subject of a very controversial debate. However, a majority of delegations were inclined to include such rules in the draft Convention due to the lack of private international law rules relating to assignments in many legal systems. From this approach follows necessarily that chapter V must apply independently of whether or not the assignor or the debtor is located in a Contracting State. It would, in fact, be difficult to justify the retention of this chapter for the sole purpose of filling gaps pursuant to article 8 (2).

For these reasons, we would like, in principle, to have the square brackets around article 1 (3) deleted. Nevertheless, regard should be had to the somewhat independent nature of chapter V which is in fact a convention within the draft Convention. An opt-in mechanism for chapter V, rather than the opt-out mechanism currently envisaged by articles 1 (3) and 37, would reflect this situation more appropriately.

Financial receivables (article 5)

It is essential to meet the specific needs of the financial services industry with respect to assignments in international banking practice. The question is whether such practices should be entirely excluded from the scope of the draft Convention or whether specific rules should be provided. Although at the beginning of the work of the Working Group the draft Convention was thought to cover essentially trade receivables, we have now a text before us, which is suitable to regulate all types of commercial transactions and which meets the interests of the financial services industry to a considerable extent. Hence, it appears appropriate to include a specific set of rules along the lines of article 5 insofar as assignments in banking practice differ from assignments of trade receivables. For reasons of consistency, exceptions to the general rules should be as limited as possible and clear. Variant B appears to better meet these criteria. Variant A is rather unclear in its language and might give rise to more interpretation problems, even if it introduces fewer exceptions to the rules of the draft Convention than variant B. Whereas we favour article 5 in general and variant B in particular, we nevertheless deem it preferable to provide a positive definition of non-trade receivables rather than only a negative one as set out in article 6 (l). We are well aware of the difficulty in drafting a definition which is sufficiently broad to cover not only present practices but also future ones. However, we think that the matter is well worth further consideration by the Commission.

Definition of "location" (article 6 (i))

The definition of the connecting factor "location" has been the subject of great disagreement and continued discussion among the delegations. This fact seems to suggest that no solution is completely without shortcomings. However, a number of elements have emerged that should allow the Commission to reach consensus. One element is the need for the use of objective criteria for the determination of location for the purposes of priority. For legal systems requiring publicity by means of registration to operate efficiently, third parties need to be able to determine easily the place in which they need to file or search. Another element is the flexibility in determining the location of the debtor for purposes of the application of the draft Convention.

Yet another element, is the need to avoid departing from other uniform texts to a greater extent than it is necessary.

Article 6 (i) satisfies most of these requirements and therefore constitutes a valid basis for further discussion. However, we are sceptical with respect to special rules for defining the location of branch offices of banks. First, it is unclear whether such special rules are necessary. Second, in any event any special rules must satisfy the aforementioned principles, in particular that, for the purposes of the priority provisions of the draft Convention, any definition of location must turn around an objective criterion. A definition which relies on an entry into the books of a bank does not satisfy this requirement.

Proceeds (article 26)

With respect to article 26 on the law applicable to proceeds, we share the view that the concept of proceeds is a commercially sound one and should be addressed in the draft Convention. However, the way articles 24 and 26 are currently drafted could result in confusion and uncertainty. In particular, the relationship between article 24 (b) and 26 should be further clarified. Article 24 (b) deals with proceeds and the priority of rights in proceeds by way of a conflict of laws rule, subjecting "the existence and extent of the right ... in proceeds ..., and the priority ... in those proceeds" to the law of the State where the assignor is located. Article 26, on its face, deals with the same issues by way of a substantive law rule. In effect, article 26 provides a uniform rule with respect to an issue which, pursuant to article 24 (b), is left to the national law of the State where the assignor is located. Hence, those rules deal with the same issue in a conflicting way and, therefore, need to be further clarified. One way to clarify this matter would be to leave the existence and extent of rights in proceeds to the law of the State where the assignor is located, but to require these States to recognize rights in proceeds at least as provided in article 26, that is, to read this latter provision as a minimal rule. As a result, legal systems that recognize rights in proceeds more generously would not be affected.

Furthermore, even though the concept of proceeds is sound from the point of view of commercial practice, we strongly suggest to avoid the term "proceeds". This term clearly emanates from common law systems. As a matter of principle, a uniform law should never use terminology which has a unequivocal meaning in a given legal system because users belonging to this system normally overlook the uniform character of such a rule while users in other legal systems might encounter problems to understand the rule. The term "proceeds" could be replaced by terms such as "payment" or "substitute".

TUNISIA

[Original: Arabic]

Title

As indicated in its scope of application, the draft Convention regulates assignments by way of sale (for financing purposes, namely for obtaining value) and assignments by way of security (for obtaining credit). The title with the reference to "financing" does not adequately reflect the scope of the draft Convention, since it is limited to referring to assignments for financing (for value). Therefore, the title "Assignment of Receivables in International Trade" would be preferable, in particular, because it gives a complete indication of the scope and the objectives of the draft Convention. It would be advisable to adopt it and to exclude from the title any reference to receivables financing. It should be noted, however, that in the event that the reference to financing is retained, it would be preferable to redraft the title as follows: "Assignment of Receivables for Financing Purposes". Such a formulation would be more adequate and closer to the title in the French version (*"cession de créances à des fins de financement"*).

Preamble

In the first paragraph, it would be advisable to replace the word "uncertainties" by the words "lack of clarity". In the second paragraph, the words "assignment of receivables" and the words "receivables financing" have been suggested. The first expression: "assignment of receivables" would be preferable because the matter relates to the assignment of receivables for the purposes of obtaining value as well as for the purpose of obtaining credit. In the fifth paragraph, it would be advisable to replace the words "affordable rates" by the words "affordable costs" and to avoid the repetition of language, caused by the word "facilitate" and the word "affordable" therein (only applicable to the Arabic version). The suggested change would make the meaning of this paragraph more accurate.

Scope of application (articles 1, 2 and 3)

In paragraph (2), the word "unless" should be replaced by the words "if [the debtor] is not [located] ... ". In paragraph (4), it seems that there is an error in the number of the article referred to in this paragraph. The correct number is 40 and not 36.

Articles 2 and 3 contain definitions of internationality and assignment respectively. They have no connection with the scope of application. Therefore, it would be advisable to insert them into article 6 on definitions. Subparagraph (a) of article 2 should be simplified as follows: "The creation of rights in receivables as security for a debt or other obligation is deemed to be an assignment."

Definitions (article 6)

In subparagraph (e), in line with recent legislative trends allowing the use of modern means of communications, it would be advisable to use the words "information in a traceable written form" instead of the words "a communication in writing". Subparagraph (j) should be revised as follows: "'Law' means the law in force in a State, with the exception of the rules of private international law."

Effectiveness of assignment (article 10)

The words "at the time of the conclusion of the contract of assignment" should be replaced by the words "on the date of the conclusion of the contract of assignment."

Representations of the assignor (article 14)

Paragraph (2) should be revised as follows:"Unless otherwise agreed between the assignor and the assignee, the assignor may not be a guarantor as to the debtor's discharge by payment or to the debtor's financial ability to pay."

Public policy (article 25)

In paragraph (1), the words "the public policy of the forum State" should be replaced by the words "the public order of the forum State". It should be noted that, in the French version, the words "ordre public" are used.

Law applicable to the relationship between the assignor and the assignee (article 28)

Paragraph (3) should be revised as follows: "If the contract of assignment is connected with one State only, the fact that the assignor and the assignee have chosen the law of another State does not prejudice the application of the law of the State with which the assignment is connected, where the rules of its jurisdiction [do not permit agreement to choose the applicable law] [do not allow the application of its law to be excluded by agreement between the parties]."

Law applicable to priority (article 30)

This article is a repetition, in form and content, of the provisions of articles 24 and 25 and should, therefore, be deleted.

Application of the annex (article 40)

It seems that an error is made in the Arabic version of this article. Reference should be made to sections I and II or section III of the annex rather than the draft Convention. Before the words "this Convention", insert the words [of the annex to].

Article 43

In paragraph (3), the words "made on ... the date when the Convention enters into force" should be replaced by the words "made starting on the date on which this Convention enters into force".

International organizations

COMMERCIAL FINANCE ASSOCIATION

[Original: English]

I. GENERAL COMMENTS

The Commercial Finance Association ("CFA") would like to take this opportunity to formally commend the Working Group on its hard work and continued dedication to this project. The UNCITRAL goal of facilitating the development of international trade through the availability of business financing at more affordable rates will most certainly be aided by the greater clarity and consistency that the draft Convention on Assignment of Receivables ("the draft Convention") will bring to the practice of assignment of receivables.

The current version of the draft Convention (A/CN.9/466, Annex I) has made great progress at such clarity and consistency, while managing to balance the many and diverse legal systems and public policies of the participants. The specific comments noted below are offered by the CFA as an attempt to improve on this draft, in ways that are in harmony with the intent of those participants.

In addition, we would like to emphasize that, after completion and adoption of the draft Convention, there remains a need to make further progress in developing a public notice filing registry. The approach, currently included in the annex to the draft Convention, of permitting each State the option of adopting some form of notice registry system is an acceptable compromise necessary for the draft Convention to gain world-wide acceptance. However, it remains our firm belief that the transparency and certainty that a public registry system would provide in determining the existence and priority of competing claims are absolutely essential to the growth of receivables-based financing.

II. SPECIFIC COMMENTS

Subsequent assignments (article 1 (1) (b))

Article 1 (1) (b) needs to adopt the same requirement for subsequent assignments as is done for initial assignments in article 1 (1) (a). In order to have consistency in the application of whose legal regime applies to various assignments, for any subsequent assignment to be brought under the draft Convention, it must be clear that the assignor be located in a Contracting State. It is our belief that this has always been the intent of the Working Group.

Assignment of receivables other than trade receivables (article 5)

In light of the significant issues that still surround the possible application of variant A or B, or any alternative to them, the CFA is unable to offer its opinion at this time. Further discussion is needed in order to better understand the concerns of other industries or business practices which might be impacted by the draft Convention.

Definition of "location" (article 6 (i))

During the October 2000 session of the Working Group, the issue arose of whether a further refinement was needed for determining the location of a domestic branch of a foreign bank. Without any modification, the location would revert to the central administration of the bank itself, which could have impractical consequences. The U.S. delegation made the suggestion of focusing on the location of the entity on whose books the receivable is kept. This seems to be an acceptable solution, since this is in line with the normal practice of foreign branches. In addition, it could be easily included in standard assignment representations and warranties, mitigating the need for burdensome due diligence [discovery efforts] by the assignee.

Effectiveness and time of effectiveness of an assignment(articles 9 and 10)

The Commission would need to resolve the discrepancy in these articles as to the time an assignment of future receivables becomes effective. The time of effectiveness of the assignment of a future receivable needs to be tied to the conclusion of the contract of assignment, regardless of the fact that the receivable itself does not "arise" until a later date. This legal fiction is necessary not only for priority issues between competing assignees, it is critical for any bankruptcy analysis.

Contractual limitations on assignment (article 11)

The Commission would also need to address the question of the potential ability of the debtor to void the underlying contract. Since this could cripple the assignee's right to collect, it would be a major set-back to the intent of the draft Convention. Assignees understand that they must accept an assignment subject to any defenses arising out of performance of the underlying contract. However, in light of the important intent of articles 11 and 12 of mitigating the impact of contractual anti-assignment clauses, permitting the debtor to use the breach of such a clause in an action against the assignor to nullify the contract itself would be totally contradictory to the supposed protection granted to an assignee in article 11 (2) who simply knew about the clause and decided to accept the assignment anyway.

Representations of the assignor (article 14)

Article 14 does not make clear whether representations are given only to the immediate assignee or also to any subsequent assignee. As a result, it is not clear whether any subsequent assignee may turn against the assignor for breach of representations. We think that it should be left to the parties themselves to determine who has the right to rely on the representations given. In the absence of express agreement to the contrary, the economic consequences of that decision of the parties should only flow to the immediate assignee.

Right to payment (article 15)

In trying to prevent an undue advantage to an assignee who violates an agreement with an assignor, article 15 (2) may be giving the debtor, or some other party, an unintentional windfall, if a notification given in violation of an agreement between the assignor and the assignee is ineffective for the purposes of article 20, 22 or 24 to 26. While an assignee who wrongfully notified the debtor should not benefit from it, these severe consequences should not befall the assignee regardless of the type or severity of the violation. At minimum, some limiting language should be added tying the violation to the penalty. The following phrase might be added in article 15 (2): ", if the provision of the agreement that was violated was intended to have a contrary effect."

Law applicable to competing claims (article 24)

There may very well be a significant discrepancy between the language of paragraph (a) (i) and the intent of the Working Group in determining the extent and priority of the right of an assignee vis-à-vis competing assignees. The prerequisite for applying this subsection is that the assignees must have received their assignments of the same receivable from the same assignor. In a chain of subsequent assignments (very probable in syndicated loans and asset securitization transactions where co-lenders and investors get their undivided interests through the means of a separate assignment), the ultimate assignee technically does not get its assignment from the same assignor. Therefore, if the draft Convention were interpreted literally, there would be no substantive rule in the draft Convention governing the competing claims of that assignee in competition with an assignee that, for example, received its rights in an assignment from the original assignor.

It is our belief that the Working Group did intend to cover this situation, based on the rationale that any subsequent assignments are derived from the original assignment and are thus, in the eyes of the Working Group, from the "same" assignor. Yet nowhere in the draft Convention is there any qualifying language applied to the term "assignor" causing one to distinguish between the original or any subsequent assignor. In fact, quite the opposite, article 2 (b) was inserted to make it clear that the term could be used to refer to the initial or any subsequent assignor. A resolution of this problem might be to include clarifying language in the commentary, or revise the text of article 24 (a) (i) in order to show that the assignment came, directly or indirectly, from the same "original" assignor.

Article 36

The CFA strongly believes that no exception should be made for receivables arising from the sale or lease or mobile equipment to be covered by the draft Convention on International Interests in Mobile Equipment, currently being prepared by Unidroit. The more inclusive and comprehensive nature of the draft Convention requires that it be given priority.

EUROPEAN BANKING FEDERATION *

[Original: English]

I. GENERAL COMMENTS

The UNCITRAL Working Group on International Contract Practices, entrusted with the preparation of a uniform law on assignment of receivables, adopted at its last session in Vienna in October 1999 a draft Convention for submission to the Commission's session in New York in June 2000. In this draft Convention, the issues of the treatment of financial receivables and of the meaning of "location", amongst others, remain pending and the European Banking Federation is pleased to have the opportunity to put forward its views on these matters.

We welcome the initiative of UNCITRAL in drawing up this draft Convention and believe that the harmonisation of the law governing the assignment of receivables will considerably improve the availability of credit to support world trade. We believe, however, that it is important that the provisions of the draft Convention do not inadvertently disrupt the legal basis of widely used financial contracts and the availability of credit in support of trade. Therefore, we propose that these issues left pending by the Working Group should be resolved as follows:

1. The effectiveness of non-assignment agreements relating to financial receivables should be preserved where they form an inherent part of the transaction structure, a more limited exception than that in the current draft.

- In article 5, variant B is to be preferred, but the scope of the exception should be limited to articles 11 and 12, and only to cases where the debtor has not consented to the assignment.

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* The European Banking Federation represents the interests of more than 3,000 banks in the EU and in Switzerland, Norway and Iceland.

- The definition of "trade receivable" in article 6 (l) should be amended to exclude receivables arising under payments or securities settlement systems and receivables arising under financial contracts governed by netting agreements. Definitions of "payments or securities settlement system", "financial contract" and "netting agreement" should be added.

- "Financial contract" should be defined sufficiently broadly so that the exclusion applies to the common practice of financial institutions of providing credit facilities using a deposit or securities account as collateral, but not to such accounts more generally.

2. The definition of "location" should be consistent for all parties - assignor, assignee or debtor - and should make provision for branch offices.

- In article 6 (i) the "location" should be geared uniformly for the assignor, assignee and the debtor - and not only for the debtor - to the *"place of business most closely connected"* to the contract.

3. The overriding importance of international efforts to combat money laundering should be specifically acknowledged in the payment provisions.

- Article 19 should apply to assigned deposit accounts only to the extent that the deposit-taker is able to comply with relevant identification requirements.

II. DRAFTING PROPOSALS

Limitation on receivables other than trade receivables (article 5)

We propose that variant B be adopted, with the addition of the words "unless the debtor consents" and with the deletion of the words "...and section II of chapter IV..." so that the text would now read (changes underlined):

> " Unless the debtor consents, articles 11 and 12 apply only to assignments of trade receivables. With respect to assignments of receivables other than trade receiv..bles, the matters addressed by these articles are to be settled in conformity with the law applicable by virtue of the rules of private international law."

Definitions and rules of interpretation (article 6)

We propose an amendment to article 6 (i) to make the definition of "location" consistent for all parties, assignor, assignee or debtor, so that this definition reads (changes underlined):

"(i) (i) a person is located in the State in which it has its place of business;

(ii) if the assignor or the debtor has more than one place of business, the place of business is that which has the closest relationship to the original contract;

(iii) if the assignee has more than one place of business, the place of business is that which has the closest relationship to the assignment contract;

(iv) if a person does not have a place of business, reference is to be made to the habitual residence of that person."

We propose an amendment to article 6 (l) to give greater clarity to matters excluded from the definition of "trade receivable", so that this definition reads (changes underlined):

"(l) "trade receivable" means a receivable arising under an original contract for the sale or lease of goods or the provision of services other than receivables arising under payments or securities settlement systems and receivables arising under financial contracts governed by netting agreements or used as collateral."

We also propose the addition of three further definitions in article 6:

"(m) "payments or securities settlement system" means any contractual arrangement between three or more participants with common rules for the settlement of payment or security transfer orders, and of any related collateral, between the participants, whether or not supported by a central counter-party, settlement agent or clearing house.

"(n) "financial contract" means any spot, forward, future, option or swap transaction involving interest rates, commodities, currencies, equities, bonds, indices or any other financial instrument, any repurchase or securities lending transaction, any deposit transaction and any other transaction similar to any transaction referred to above entered into in financial markets and any combination of the transactions mentioned above, and any collateral or credit support related to any transaction referred to above.

"(o) "netting agreement" means an agreement which provides for one or more of the following:

(a) the net settlement of payments due in the same currency on the same date whether by novation or otherwise,

(b) upon the insolvency or other default by a party, the termination of all outstanding transactions at their replacement or fair market values, conversion of such sums into a single currency and netting into a single payment by one party to the other, and

(c) the set-off of amounts calculated as contemplated by the preceding phrase (b) under two or more netting agreements."

Debtor's discharge by payment (article 19)

We propose that paragraph (5) should be amended so that it reads (changes underlined):

"(5) If the debtor receives notification of the assignment from the assignee, the debtor is entitled to request the assignee to provide within a reasonable period of time adequate proof that the assignment has been made and, where the receivable is a deposit, to comply with any requirements imposed to prevent money laundering as if the assignee were a depositor, and, unless the assignee does so, the debtor is discharged by paying the assignor. Adequate proof includes, but is not limited to, any writing emanating from the assignor and indicating that the assignment has taken place."

III. SPECIFIC COMMENTS

1. Why are banks and other financial institutions concerned about preserving the efficacy of non-assignment agreements in financial transactions?

At first sight, it might appear that a bank or other party to a financial transaction is in no different position from any other debtor in relation to any other transaction. But this is not the case. Many financial transactions involve credit risk and assignment increases not only the credit risk involved, but also the security, litigation, insolvency and regulatory risks involved.

For example, a bank provides a letter of credit via its correspondent to a third-party exporter on behalf of its importer customer against an undertaking by the customer to reimburse the bank for any amount paid under the letter and with the security of a deposit by the customer. The bank will use the deposit in the event that the customer fails. If the customer assigns the deposit to an assignee before failing, the assignee may request payment from the bank, leaving the bank to claim against its customer, a credit risk for which the bank had not contracted (that was, after all, why it took the deposit as security). In this case, a non-assignment condition on the deposit is an inherent part of the transaction and, if its efficacy is called into question, such arrangements will no longer be made available to customers.

Another typical transaction is an interest-rate swap where payments indexed to a fixed rate by one party are netted against payments indexed to a variable rate by the other to leave a flow in either direction. In this case, the credit exposure can vary during the life of the swap as interest rates change, and the individual payments before netting are often very large compared with the net amount actually paid.

Netting agreements extend this concept to cover a whole range of transactions and offset all the cash-flows and obligations to one net figure per currency for settlement purposes and one single figure in the event of default, including liquidation of either party. Within such an agreement, an assignment of an individual "receivable" would be a fundamental change to the structure and, for this reason, is generally subject to the prior consent of the other party to the agreement. The breach of such a clause of prior consent constitutes an event of default triggering the winding up of the whole agreement. As a result of "cross-default" clauses which are included in many financial agreements, a default on one such agreement will cause all other agreements to be terminated with potentially fatal consequences for the customer and considerable risk to the financial institution whose whole portfolio structure may be disrupted.

The regulatory treatment of netting agreements is a significant factor in the willingness of banks to enter into transactions. Regulators recognize the reduction in credit risk by allowing a corresponding reduction in required capital and this, in turn, makes the transaction available to the customer at a lower price. But regulators will only accept netting as effective if the bank has obtained a clear legal opinion that the agreement will achieve the netting before, during and after insolvency. If doubt is expressed in the opinion as a result of uncertainty about the application of the draft Convention, the netting agreement will not be treated as effective for regulatory purposes, the capital benefit will not be available and the cost of the transaction will rise.

In addition, the assignment of certain types of receivables without the debtor's consent may lead in certain circumstances to inadvertent breach of national regulatory provisions. In some situations, such a breach may involve civil and criminal liability for the debtor. For example, a debtor may find itself in technical violation of United States security or commodity law (such as that applying to public offerings) if an assignor is able to assign certain types of transactions, such as repos, securities lending or currency swaps, originally contracted outside the United States, to an assignee located in the United States.

All these factors of uncertainty would undoubtedly lead to a reluctance among financial operators to use these financial instruments and this would reduce availability of credit for trade and thereby undermine the principal objective of the draft Convention.

2. *Are these concerns not met by the debtor-protection provisions in section II of chapter IV, or by the wording proposed in variant A of article 5?*

Although one of the most important debtor-protection provisions in section II of chapter IV (article 20) states that any assignment is subject to existing rights of set-off, the way in which the provision is framed means that it does not seem to extend to close-out netting mechanisms typically included in netting agreements, which are still contingent on a default and include all existing and future transactions within their scope. Also, close-out netting is not always accomplished using set-off as a legal mechanism.

Variant A of article 5 would allow the assignment of financial receivables but would provide that the rights and obligations of the debtor would not be affected in the absence of consent. The result of this complex combination would be that the assignment would be valid as between the assignor and the assignee but the debtor would be ostensibly unaffected. In the event of liquidation of the assignor, the debtor would also be a creditor and the assignee might dispute the priority of the debtor's claim in the liquidation. Article 24 provides that this dispute would be decided according to the law of the State where the assignor is

located. Although the debtor might be successful in refuting the assignee's claim, this is unnecessary expense and the prospect of potential litigation will discourage financial institutions from entering into such contracts. It is also unrealistic to give purported effectiveness to an assignment in a context where such an action is inappropriate.

Whilst the regime proposed in variant B is clear, the one proposed in variant A is likely to constitute a factor of high legal uncertainty for the financial markets.

3. Why remove reference to section II of chapter IV from variant B of article 5?

If a receivable is not a trade receivable, article 5, variant B with the suggested revisions, would disapply articles 11 and 12. If as a result, an assignment is not effective because of an agreement not to assign without the debtor's consent which has been withheld, there is no assignment and chapter IV has no application. If, on the other hand, there was no need for the debtor's agreement or that agreement had been obtained, the provisions of chapter IV should apply as to any other receivable. We have no wish to reduce the scope of the draft Convention any more than is necessary to protect the transactions about which we have concerns.

4. Why change the definition of "trade receivable" in article 6 (l)?

The purpose of the amendments proposed to article 6 on definitions is to limit the scope of the exclusion of financial contracts. The original wording for the definition of "trade receivable" would have excluded "financial services", a term that is both extremely wide in its scope and also difficult to define. By excluding only receivables arising under payments or securities settlement systems, or under financial contracts governed by netting agreements or used as collateral, we propose to narrow the scope of the exclusion and limit it to certain categories of contracts or payments that are subject to netting or collateral arrangements necessitated by insolvency considerations, and mandated by international financial supervisory standards (including capital adequacy rules).

It is common for financial institutions to use deposits or securities as collateral for trade credit purposes. In such circumstances, the assignment of the deposit or securities is subject to the debtor's consent. To allow the account holder to assign such deposit or securities without restriction would strongly diminish the value of deposits or securities as collateral, which would in turn create as many difficulties for trade finance as the proposed draft Convention is designed to avoid.

5. Are the additional definitions required?

We believe that the additional definitions proposed in draft Article 6 (m), (n), and (o) improve considerably the clarity of the draft Convention and ensure that the scope of the exclusion for financial receivables is no wider than it needs to be to meet our concerns.

6. How is assignment affected by money-laundering prevention measures?

The international community has made the prevention of money laundering a key element of the fight against drug trafficking and other serious crime. Financial institutions have been made subject to specific requirements amongst which are those of customer identification and the establishment that funds have been received from a *bona fide* source. Deposit-taking institutions cannot agree to assignments of deposits to third parties unless they are able to complete the requisite identification and probity checks.

Our concern relates to fraud or misuse of funds. Suppose depositor Mr. Smith assigns the deposit to Mr. Jones. A person presents himself at the bank, says that he is Mr. Jones and provides a letter signed by Mr. Smith confirming the assignment. He then requests the bank to pay the deposit to him in cash or by international transfer to a third party. The bank is at risk of being a party to unlawful conversion of the funds, just as it would be if it dealt with a cheque from Mr. Smith in this way. Banks protect themselves by insisting on proper identification of Mr. Jones before accepting cheques payable to him. These identification checks are incorporated in the "know your customer" element of money-laundering rules, rather than the suspicious transaction element.

Article 19 appears to override the bank's right to insist on identification. There is protection in article 19 (5) that the debtor can demand written evidence that the assignment was made, but this does not solve the assignee identification problem. The change proposed to article 19 would clarify that the provisions of the draft Convention are not in conflict with money-laundering prevention requirements.

The proposals in our draft are, in practice, modest in effect.

- Most deposits will not involve an anti-assignment clause, so the question of the debtor's consent does not arise. Where there is an anti-assignment clause because the deposit is used as collateral, the same arguments as for netting agreements apply.

- Banks will generally insist on identification of the assignee, so the added words in article 19 (5) merely protect the bank and avoid any potential dispute. Again, most assignments are likely to be to other financial institutions, so the need for identification will be infrequent.

7. *Why amend the definition of "location"?*

Financial institutions are involved in assignments as debtors, assignors and assignees, and nearly all financial institutions operate through branches which generally transact business under local law and jurisdiction. We are, therefore, particularly interested in the provisions for determining the location of a party with more than one place of business. We believe that in the case of several places of business, the place which has the closest relationship to the contract must be preferred to that of the central administration currently stipulated for the assignor and the assignee in article 6 (i) (ii). This criterion of "central administration" is particularly questionable as far as the assignor is concerned, basically for three reasons:

- first, in cases where the assignor is affiliated to an internationally operating group, it is not *ipso facto* clear to outsiders whether the contractual relationship is entered into with a dependent branch or with an independent subsidiary;

- secondly, reference to the central administration (or head office) may result in an assignment that is carried out through the branch of a company outside the country where that head office is located (being classified as an "international assignment"), even if this branch as well as the assignee and the debtor are all established within one legal regime which is different from the one where the head office is established. This would lead to the application of a legal regime which has no real connection to the contract.

  For example, a company whose head office is established in France assigns a receivable through its branch established in Germany. The assignee and debtor are also located in Germany. Any reference to the head office (or central administration) would lead to the application of French law notwithstanding the fact that France has no real connection to the contract;

- finally, reference to the head office means that where competing law is concerned, application of the legal regimes of the head offices would be encouraged without taking into account any inherent legal connection of such regimes with the transactions involved.

A consistent definition of "location" for all parties to a transaction (assignor, assignee and debtor) will accord more closely with business reality and help to prevent any questions of competing legal regimes arising.

FINANCIAL MARKETS LAWYERS GROUP*

[Original: English]

The Financial Markets Lawyers Group wishes to endorse the recommendations recently made by the European Banking Federation ("EBF") to improve the text of the UNCITRAL draft Convention on Assignment adopted by the Working Group on International Contract Practices ("the Working Group") at its last session in Vienna in October 1999 ("the draft Convention"). We applaud the efforts of UNCITRAL to facilitate greater cross-border trade financing and believe that adoption of the draft Convention will lead to greater harmonization of the rules currently governing cross-border assignments of receivables.

We believe, however, that the draft Convention should not undermine the legal basis upon which international over the counter ("OTC") financial markets contracts are currently entered into and used as collateral. As the Working Group has been made aware, the standardized agreements presently used by OTC market participants generally include a provision expressly prohibiting the assignment of any underlying rights or obligations by one counter-party without the prior written consent of the other counter-party and provide for certain rights and obligations of the parties with respect to collateral.

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* The Financial Markets Lawyers Group ("FMLG") is organized as an independent body under the sponsorship of the Federal Reserve Bank of New York ("FRBNY") and is made up of representatives of the various United States and European commercial and investment banks that are active in the over the counter ("OTC") foreign exchange markets. The FMLG's primary responsibility

is to coordinate various legal projects undertaken by the New York Foreign Exchange Committee ("FXC"). The FXC, which was likewise organized under the sponsorship of FRBNY, represents many of the most significant participants in worldwide foreign currency trading. The FMLG is also responsible for drafting legislation aimed at enhancing the integrity of financial markets and for preparing papers and model contracts on specific market-related topics.

These provisions lend certainty and predictability to the set-off and netting provisions of these agreements and thereby enable market participants to better manage their counter-party credit risk.

As a result, we agree with the EBF's suggested changes to the draft Convention and encourage the Commission to incorporate the defined terms "financial contract" and "netting agreement" into the draft Convention using the language suggested by the EBF. For purposes of clarification, however, we would like to note that it is our understanding that the EBF's definition of the term "netting agreement" is intended to include master netting agreements (such as those currently published by the FXC) that allow a party to close-out some but not necessarily all of the underlying transactions in certain situations.

We also share the EBF's view that the draft Convention should not apply to receivables arising from the operations of a payment or securities settlement system. Allowing participants of a securities or payment settlement system to assign their receivable is obviously likely to substantially undermine the fluid operations of such systems and impair the certainty and finality of settlements. We, therefore, agree with the EBF's recommendation that such receivables should be more clearly excluded from the scope of the draft Convention.

In short, we urge the Commission to endorse the textual changes suggested by the EBF in its comments. Again, we commend the Commission's efforts to develop a legal regime under which global trade financing can better flourish. We would be prepared to provide the Commission with any further information it may require.

EUROPAFACTORING

[Original: English]

"Location" (article 6 (i))

The issue of location of the assignor and the assignee is still an open matter, whereas the issue of the location of the debtor has been settled in a reasonably satisfactory way. The central administration rule will lead to predictable results with respect to the application of the draft Convention. However, if the assignor has a place of business (branch office) in a Contracting State and a central administration in a non-Contracting State, the draft Convention will not apply. The exception proposed with respect to branch offices of financial institutions is intended to reflect the idea that the scope of application of the draft Convention should be as wide as possible and to ensure that the draft Convention would apply to the cases just mentioned. We welcome that idea. However, there are two problems with the proposed exception. Firstly, an exception for branches of certain industries would be difficult to define (should banks be exempted, or financiers, or financiers and insurance companies, and under which law would be determined whether a specific business is a banking business). As a result, uncertainty would arise as to the application of the draft Convention.

On the other hand, the merits of such an exception would be limited. In view of the fact that the law applicable to priority issues is to be determined by reference to the location of the assignor, the exemption would result in the application of the priority rules of the country in which the branch office is located. It is not certain that such priority rule would be recognized in the country in which the central administration of the assignor is located, and in which insolvency proceedings would likely be commenced. As a result, in order to be protected, the assignee would have to also comply with the priority rules of the country in which the central administration is located.

It might seem strange to business, but a receivable arising from a contract with a branch office is, legally speaking, a receivable vested in the legal entity located at its central administration. With respect to factoring, the importance of the envisaged exemption is minor, as factoring companies and their clients have places of business in countries, in which adoption of the draft Convention can be expected. With respect to banks with central administration in a tax haven (which would normally not adopt the draft Convention) and branch offices in financial centres, again the importance of this exemption would be minor, at least to the extent that such banks are likely to act as assignees rather than assignors (and their location would not play a role in the determination of the law applicable to priority).

It might seem a futile task to determine the different possibilities with respect to the application of the rule on location and the exception as to branch offices. However, we have tried to find, at least, a way to systematize and understand the solutions agreed on so far. In this context, we would note that, while the location of the assignor in a Contracting State is important for determining the scope of application as well as the applicable priority rules, the location of the assignee or the debtor is of no importance for those matters (with the exception of the question of internationality).

If mainly the location of the assignor matters, it would be wise to first establish to what extent business is affected by the rule and to decide accordingly as to any exceptions. The Commission may wish to focus on only a small number of cases with respect to receivables originating in the country in which the assignor is located and leave aside subsequent assignments to which, by virtue of the subsequent assignment rules, the draft Convention would apply for the reason that an international assignment had preceded.

Assignor	Branch office	Assignee	Branch office	Scope	Priority according to convention	
In contracting state (in)	In	In contracting state	none	Yes	yes	Transaction from main office
	out			yes	yes	
	none			yes	yes	
In non-contracting state (out)	in			no	no	
	out			No	no	
	In			yes	yes	Transaction from branch office
in		In	None			
	out			To be debated (yes)	To be debated (no)	
out	In			To be debated (yes)	To be debated (no)	
	out			No	no	
	In		none	Yes	yes	Transaction from main office
in		Out				
	out		In	yes	yes	
	none		out	yes	yes	
out	in		In	no	no	
	out		out	No	no	
	In		In	yes	yes	Transaction from branch office
in		Out				
	out		Out	To be debated (yes)	To be debated (no)	
	in		in	To be debated (yes)	To be debated (no)	
out						
	out		Out	No	no	

Form of assignment

The draft Convention does not contain any substantive rule on the form of assignment. To ensure certainty, at least as to the law applicable to form, the draft Convention should specify that the law of the country in which the assignor is located governs form requirements. Such an approach would be consistent with the approach followed with respect to the law applicable to priority issues. The draft Convention should also clarify that, wherever a written assignment is required, writing would be understood in accordance with

the draft Convention, namely it would include electronic means of communication, even if such means are not recognized in the country of the assignor's location.

Financial receivables (article 5)

We have always welcomed the idea that the draft Convention should be aimed at improving the extension of credit at a lower cost, while not interfering with practices already available in the market. If such existing practices can be defined properly and isolated from practices involving the financing of trade receivables, such as factoring, we would not oppose any specific rules as to such practices. In this context, it is a matter of discussion whether the draft Convention or only certain provisions (e.g. articles 11 and 12) should not apply to such practices. The adoption of the draft Convention may be opposed by an industry group on the ground that specific exemptions were granted to one and not another group. However, based on the experience gained in the context of the adoption of the Ottawa Convention on International Factoring ("the Ottawa Convention") in Germany, which was opposed by certain groups solely on the ground of the anti-assignment clause rules, we would note that excluding certain financial practices from the scope of the draft Convention altogether may increase the acceptability of the draft Convention.

Relation to other international texts (article 36)

For policy reasons, it may be wise to subordinate the draft Convention to other conventions and, in particular, to the Ottawa Convention. The scope of the Ottawa Convention is very narrow (it does not even cover all factoring operations) and the rules of the two Conventions may be similar. However, such an approach would result in uncertainty. The parties may exclude the application of the Ottawa Convention as a whole (the UNCITRAL draft Convention does not allow such a total exclusion). If the parties exclude the application of the Ottawa Convention, the question arises whether the UNCITRAL draft Convention or national law would apply to fill the gap. Furthermore, the Ottawa Convention allows certain reservations with respect to the rule on anti-assignment clauses and two States have made such a reservation.

A regime with national and international rules and exceptions as to anti-assignment and with international rules with different content and scope of application would not be conducive to legal certainty or consistent with the main objectives of the draft Convention. In view of the above, while praising the draftsmen of the draft Convention for their modesty, we would suggest, with due respect to the Ottawa Convention, that the draft Convention should supersede the Ottawa Convention. To the extent that the draft Convention is widely adopted, such an approach would ensure certainty in all types of factoring operations universally. We reserve further comments until we have the opportunity to read the comments of Governments and other organizations. Subject to the invitation of UNCITRAL, we will be represented at the Commission session in June 2000 and we would welcome any comments on the ideas mentioned above.

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
(Unidroit)

[Original: English]

I. GENERAL COMMENTS

The Unidroit Secretariat takes this opportunity to compliment the Working Group on the excellent work it has accomplished in this difficult area. In general, it notes the indirect recognition of the debt owed by the draft Convention to the Unidroit Convention on International Factoring (A/CN.9/466, para. 193) and would suggest that consideration might usefully be given to this debt being acknowledged more explicitly in the Preamble to the draft Convention, for instance, by the introduction of a clause indicating that the draft Convention has built on the achievements of the Unidroit Convention. It notes furthermore the statement that "according to general principles of treaty law, the draft Convention would not prevail over the Ottawa Convention on the grounds that the Ottawa Convention was a more specific convention" (A/CN.9/466, para. 194). We would suggest that as much be noted in any explanatory memorandum that may be prepared in due course with respect to the draft Convention once adopted.

II. SPECIFIC COMMENTS

Relationship between the draft Convention and the preliminary draft Unidroit Convention on International Interests in Mobile Equipment and the preliminary draft Protocols thereto

Regarding the relationship between the draft Convention and the preliminary draft Unidroit Convention on International Interests in Mobile Equipment ("the preliminary draft Convention") and the various preliminary draft Protocols thereto under preparation, namely a preliminary draft Protocol on Matters specific to Aircraft Equipment ("the preliminary draft Aircraft Protocol"), a preliminary draft Protocol on Matters specific to Railway Rolling Stock and a preliminary draft Protocol on Matters specific to Space Property, the Unidroit Secretariat would first note that this matter was referred to the Public International Law Working Group set up at the Second Joint Session of the Unidroit Committee of governmental experts and the Sub-committee of the ICAO Legal Committee considering the preliminary draft Convention and the preliminary draft Aircraft Protocol, held in Montreal from 24 August to 3 September 1999. The Public International Law Working Group held a first session in Cape Town and on the Blue Train en route to Pretoria from 8 to 11 December 1999. A further session of that Working Group is to be held during the Third Joint Session, to be held in Rome from 20 to 31 March 2000, after which the Report of the Working Group will be considered by the Plenary.

In its preparation of the preliminary draft Convention and the various preliminary draft Protocols thereto, the authors of these texts have at all times striven to avoid entering into conflict with the draft Convention. Evidence of this concern is to be seen in the delimitation of the preliminary draft Convention by reference to interests in mobile equipment protected by registration against identified assets. A decision was taken early on not to go for a debtor-based registration system and not to deal with perfection requirements and priority rules relevant to receivables financing detached from the underlying asset.

The sphere of application of the preliminary draft Convention was from the outset delimited by reference to categories of high-value mobile equipment that were by their nature likely to be moving across or beyond national frontiers on a regular basis in the ordinary course of business and that were capable of unique identification. The view was taken that such a limited coverage might reasonably be expected to make the new international regimen more acceptable to those States for which its innovations might raise the most difficulties. Up until the First Joint Session, held in Rome from 1 to 12 February 1999, the preliminary draft Convention accordingly contained a list of the specific categories of mobile equipment intended to be caught by its provisions (airframes, aircraft engines, helicopters, registered ships - the coverage of which was however only provisional, oil rigs, containers, railway rolling stock, space property) as well as a residual category of "other categories of uniquely identifiable object" (cf. Study LXXII-Doc. 42, Article 3 (a)-(i)).

It is true that this list no longer features in the preliminary draft Convention and it is the considered opinion of the Unidroit Secretariat that therein lies the cause of some of the past difficulties encountered by members of the UNCITRAL Working Group in envisaging the exclusion from the draft Convention of the assignment of receivables to the extent that these become associated rights in connection with the financing of those categories of mobile equipment encompassed by the preliminary draft Convention. Paragraph 85 of the Report by the Working Group (A/CN.9/466) gives the distinct impression that it was essentially the prospect of the potentially infinite scope of such an exclusion, opened up by the decision of the First Joint Session to delete the aforesaid list from the preliminary draft Convention, which had made it most difficult for the Working Group to agree to such an exclusion. For this reason, the Unidroit Secretariat intends to propose to the forthcoming Third Joint Session that it reintroduce the list deleted at the First Joint Session.

In these circumstances and on this basis, the Unidroit Secretariat's preferred solution would be that the draft Convention specifically exclude from its sphere of application the assignment of receivables to the extent that these become associated rights in connection with the financing of those categories of mobile equipment encompassed by the preliminary draft Convention. The different categories of mobile equipment which it contemplates are of a kind traditionally recognised as enjoying special status. Various aspects of the structure of the proposed new international regimen correspond to the specificity of the categories of equipment covered. Firstly, each category of equipment covered by the preliminary draft Convention will be the subject of a separate Protocol, which will contain those rules that are necessary to adapt the general rules of the preliminary draft Convention to the special characteristics particular to the financing of each such category. Secondly, for the registration of each category of equipment and the establishment of priority ranking as between each such registration a separate International Registry will be created. An insistence on the specificity of the assets covered by the proposed new international regimen has been a recurring feature of Unidroit's work on this project to date.

Independently of the foregoing, the aviation working group, the rail working group and the space working group respectively have all called for an exclusion from the sphere of application of the draft Convention of the assignment of receivables to the extent that the receivables become associated rights in connection with the financing of those categories of aircraft equipment, railway rolling stock and space property encompassed by the preliminary draft Convention as implemented by Protocols thereto. Those groups have been established under the authority of Unidroit in order to monitor the application of the preliminary draft Convention to aircraft equipment, railway rolling stock and space property and to act as a conduit for the expertise of each sector. They are made up of representatives of manufacturers, users and financiers as well as of the international organisations concerned.

The aviation, rail and space working groups have all enunciated a clear desire that assignments of receivables taken as security in aircraft, rail and space financing transactions should be dealt with in equipment-specific instruments, namely the preliminary draft Convention as implemented by the relevant preliminary draft Protocol, rather than in the draft Convention. The aviation working group in particular emphasised the strong interest of the aviation industry in establishing a single regimen that reflected aircraft financing practices and structures.

The value of assets like aircraft equipment, railway rolling stock and space property lies in the income that may be realised from the sale or lease thereof. It would undermine the concept underlying the preliminary draft Convention if the debtor could assign receivables derived from such an asset under a system different from that applicable to the pledging or other encumbering of the asset. The indivisibility of the asset and the income that may be realised from the sale or lease thereof is clearly enshrined in Articles 8 (1) and 10 of the preliminary draft Convention, relating to rights on default, and Article 14, relating to interim relief.

In the case of aircraft, rail and space financing structures there is an inextricable link between the aircraft equipment, railway rolling stock and space property, on the one hand, and the associated receivables, on the other. In the case of space financing structures, for instance, much of the value placed on a satellite is derived from the various rights associated with the operation of that satellite, in particular the associated receivables. Such rights are an essential element of the commercial value of a satellite and without such rights the satellite will have very little commercial value. It is, therefore, appropriate for security rights relating to both the asset and the associated receivables to be subject to a common regimen, in the interest of avoiding not only conflict of laws problems but also the resultant lack of commercial predictability and increases in transaction costs.

Against the alternative solution, which would consist in allowing the preliminary draft Convention and the various preliminary draft Protocols thereto to supersede the draft Convention, the aviation working group noted the following disadvantages:

> "(1) Many national legal systems, which include aircraft-specific legislation, currently contain assignment rules that are more in line with aircraft financing practices than those proposed in the [draft] Convention. There is no need to disrupt such national legal systems that work well for aircraft financing unless the resulting changes are specifically designed with aircraft financing requirements in mind.
>
> "(2) As the [preliminary draft Convention] may be adopted subsequently, unsatisfactory rules may be applicable to transactions entered into in the interim. That being the case, the finalisation and ratification processes relating to the [draft] Convention may be complicated/delayed by virtue of aviation-related objections and/or the need for further national and international consultations.
>
> "(3) The suggested approach raises rather than resolves potential problems associated with sphere and temporal applications of the two instruments. Commercial predictability will decrease, resulting in increased transaction costs.

"(4) Such an approach would not address the potential conflict between the [draft] Convention and the Geneva Convention [on the International Recognition of Rights in Aircraft]."

In this connection, it is worth noting that the preliminary draft Convention/preliminary draft Aircraft Protocol contain detailed provisions dealing with the co-ordination between the last two texts and the Geneva Convention. The first three disadvantages would be equally true for railway rolling stock and space property.

Should the Commission not feel able to accede to the Unidroit Secretariat's preferred solution, set forth above, for an exclusion from the sphere of application of the draft Convention of the assignment of receivables to the extent that these become associated rights in connection with the financing of all those categories of mobile equipment encompassed by the preliminary draft Convention, the Unidroit Secretariat would propose that it nevertheless accede to the clear desire expressed by the aviation, rail and space working groups for an exclusion of the assignment of receivables to the extent that these become associated rights in connection with the financing of those categories of aircraft equipment, railway rolling stock and space property encompassed by the future Unidroit Convention as implemented by Protocols thereto.

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Thirty-third session
New York,12 June - 7 July 2000

DRAFT CONVENTION ON ASSIGNMENT [IN RECEIVABLES FINANCING] [OF RECEIVABLES IN INTERNATIONAL TRADE]

Compilation of comments by Governments and international organizations

Addendum

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Annex

The annex is a matter which has given difficulty at successive Working Group sessions. On the whole, Ireland would favour its deletion.

Effects of declarations on acquired rights (article 41 (5))

As regards the effects of a declaration on rights acquired before a declaration becomes effective, Ireland would not favour permitting such a declaration to have retrospective effect.

ROMANIA

[Original: English]

Title and preamble

The title of the draft Convention should be: "Convention on Assignment of Receivables in International Trade". The fifth paragraph of the preamble should read: "Being of the opinion that the adoption of uniform rules governing assignments in receivables would facilitate the development of international trade and promote the availability of capital at more affordable rates."

Definition of "receivables financing" (article 6 (c))

The definition in article 6 (c) should read: " 'financing through receivables' means financing using any transaction in which value, credit or related services are provided for value in the form of receivables. The financing through receivables includes but is not limited to factoring, forfaiting, securitization, project financing and refinancing."

Conflict of laws

In articles 28 (1) and 29, the text within square brackets should be deleted. The rest should remain unchanged.

Application of the annex (article 40)

In article 40, the first set of bracketed language should be deleted. The rest should remain unchanged.

Transitional application of the draft Convention (articles 41 (5), 41 (3) and 43 (3))

The brackets around articles 41 (5), 43 (3) and 44 (3) should be deleted.

SPAIN

[Original: Spanish]

I. GENERAL COMMENTS

The Government of Spain wishes to extend its congratulations to the United Nations Commission on International Trade Law (UNCITRAL) on the conclusion of the work of the Working Group on International Contract Practices devoted to the preparation of the draft Convention on Assignment of Receivables in International Trade ("the draft Convention").

These congratulations reflect the general view of the Government with regard to the draft Convention, which it considers to be an appropriate and effective instrument for achieving progress towards a uniform law in the area of the assignment of receivables in international trade. The Government thus regards the draft Convention as having a very high degree of acceptability. The comments are structured in accordance with the note of the UNCITRAL Secretariat inviting comments (LA/TL 133 (18) CU 99/247).

II. SPECIFIC COMMENTS

Title and preamble

The title should include a reference to "international trade" but not to "receivables financing". The term "financing" could give rise to problems of interpretation, since it is not universally understood in the same way. The definition in article 6 (c) would not eliminate those problems entirely. Furthermore, including a reference to "financing" might result in creating the impression that the scope of the draft Convention is narrower than it actually is. For the same reasons, the reference to "financing" in the preamble could be deleted. However, in view of the fact that facilitating financing practices is the main objective of the draft Convention, the commentary on the draft Convention should include a list of financing practices to be covered with appropriate explanations. The commentary should, in particular, explain that normally the assignor and the assignee would be business persons. Such an explanation would also serve to clarify the meaning of the exclusion in article 4 (1) (a). In conclusion, the title should be as follows: "Draft Convention on Assignment of Receivables in International Trade".

Scope of application of chapter V (article 1 (3))

The purpose of article 1 (3) is to introduce certainty as to the law applicable to assignment-related transactions in an international context in cases where such transactions lie within or outside the scope of application of the draft Convention. For chapter V to apply, a transaction has to have an international element, as defined in article 3, but there is no need for a party to be in a Contracting State. The value of chapter V is that it codifies certain generally accepted principles, such as the principle of party autonomy (article 28) and the principle of debtor protection (article 29), while it addresses certain other matters, such as

business world. This rule, therefore, deserves support, although it may require some minor modifications. The rule would be appropriate for multinational corporations operating through subsidiaries, since each subsidiary should be treated as a separate entity even if instructions come from the parent company. However, treating branch offices as separate entities, as suggested (see A/CN.9/466, para. 99), may not be appropriate. Referring to the place of the branch, in whose books a receivable appears prior to the assignment, presents the problem of lack of transparency, since, in view of confidentiality requirements, it may not be evident to third parties where a receivable is booked. In addition, in the case of multinational corporations, there is nothing to prevent a transaction, which is being conducted and arranged in one country, from becoming directly entered on the books of the parent company and vice versa. There is certainly nothing to prevent the contract from containing an agreement regarding the place in which such entries should be made. However, such an agreement is equivalent to one in which the assignor and the assignee determine where the transaction is deemed to have been performed and, thus, determine whether the draft Convention applies or not. Such an approach would run counter to the regime envisaged in the draft Convention which does not permit parties to affect with their agreement the rights and obligations of third parties (article 7). The reason for the approach in article 7 is the need for certainty with regard to the law applicable to rights of third parties. In view of the above, a separate rule for branch offices should be avoided.

Relationship with other international texts (article 36)

The main question arising in this connection is the relationship between the draft Convention and the preliminary draft Convention and protocols being prepared by Unidroit and other organizations. Those preliminary texts, in their current formulation, are intended to address a number of assignment-related issues, including validity of the assignment, enforceability as against the debtor and priority based on registration.

Article 36 adopts an approach taken in other UNCITRAL texts (e.g. article 90 of the United Nations Sales Convention), giving precedence to other international agreements, without making a particular reference to any agreement. Bearing in mind the more general character of the UNCITRAL draft Convention and the fact that, in all probability, the UNCITRAL draft Convention will be adopted before the Unidroit instruments, the Unidroit instruments should be left to establish their own limits. The UNCITRAL draft Convention does not need to explicitly deal with a hypothetical, future and uncertain conflict. There is an additional reason to take this position. While, assuming that both instruments are in force and apply to the same situation, conflicts could arise, arrangements for the financing of high-value mobile equipment (satellites, aircraft, etc.) tend to be subject to a separate regime. It is, therefore, difficult in practice to conceive of a situation in which the two regimes might apply simultaneously to a single assignment transaction. Therefore, article 36 should be retained as is.

Articles 35 to 39

Articles 35 to 39 refer to a "State" making a declaration. In all those articles, reference should be made to a "Contracting State". In the absence of such a reference, for example, article 37 would appear imposing a special regime (e.g. that of chapter V) on those non-Contracting States that did not make a declaration (e.g. under article 37).

Application of the annex (article 40)

The second set of bracketed language in article 40 would be preferable. It seems to give more flexibility to States than the first set of bracketed language and it better clarifies the options of States and the effects of each declaration. Furthermore, it clearly sets out what is sought by the annex as a whole and by each of its sections. The annex is useful in that it provides States an option between two sets of substantive law priority rules. The annex also usefully supplements the private international law provisions of the draft Convention that refer priority issues to the law of the assignor's location. If the State of the assignor's location opts into one of the two sets of priority rules contained in the annex, those rules would govern the priority conflicts set forth in articles 24 and 26.

With regard to the registration system foreseen in the annex, it could be noted that it is viewed today with justifiable scepticism, mainly because it may affect fundamental aspects of national law. However, with the increase in the volume and the further development of electronic communications, it may become more acceptable in the future. For this reason, although our legal system does not coincide with the registration-based system envisaged in the annex, we feel that it is preferable to retain it. In conclusion, only the second set of bracketed language should be retained in article 40 and the annex should be retained as is.

Effects of declarations and transitional application issues (article 41)

Paragraphs (1) to (4) of article 41 reproduce provisions of other UNCITRAL texts (e.g. article 97 of the United Nations Sales Convention and article 26 of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit). There is no reason for departing from the approach adopted in those two Conventions. Paragraph (5), aimed at protecting rights acquired before a declaration or its withdrawal take effect, is a new provision. Its rationale, however, is not new. It underlies paragraphs (3) and (4), which provide for a period of six months between the date a declaration or its withdrawal is made and the date it takes effect.

It should be noted that declarations may be made with respect to key questions, such as the application of the draft Convention to territorial units of a federal State (article 35), the applicability of chapter V, the function of articles 11 and 12 of the draft Convention in the case of a sovereign debtor (article 38), the possibility of excluding specific practices listed in the declaration (article 39) and the application of the annex (article 40). Such declarations by States extend beyond the strictly public sphere of Government and have a direct effect on assignors, assignees, debtors and other third parties. Respect for the citizens of a State and, in particular of a State other than the State making the declaration, dictates the need for the safeguards adopted in article 41 (5). If a different position were to be taken, certainty as to the rights of parties under the application of the draft Convention would be severely compromised. Therefore, article 41 should be retained as is.

UNITED ARAB EMIRATES

[Original: Arabic]

I. GENERAL COMMENTS

Overall, we do not see any conflict between the draft Convention and the laws in force in our State (we have not received the comments of all competent bodies and may forward any further comments as soon as we receive them). However, in the Arabic text of the draft Convention, the meaning of a number of articles is obscure. This is due to the use of incomprehensible terms (such as the Arabic term for "factoring" in article 6 (c)) or to the structure of certain provisions (e.g. articles 19 (6), 20 (3) and 22 (1)).

II. SPECIFIC COMMENTS

Title

The title should be: "Draft Convention on Assignment of Receivables in International Trade" (with a change in the Arabic word for "assignment").

Law applicable to the relationship between the assignor and the assignee (article 28)

We are of the opinion that the principle established by article 28 that the law applicable to the rights and obligations of the assignor and the assignee in the absence of [their] choice of a law is "the law of the State with which the contract of assignment is most closely related" is not sufficiently specific. Nevertheless, we note that article 37 permits a State to declare at any time that it will not be bound by chapter V.

Treatment of receivables other than trade receivables (article 5)

The text of variant A contains numerous references to other subsequent articles, which in turn refer to some other articles. This results in a fragmentation of the substantive integrity of the provisions of the draft Convention and in obscuring their meaning. The same comment is applicable to many of the articles of the draft Convention. We propose that variant B be adopted, as it addresses the same provisions with fewer references and is therefore clearer.

International organizations

FACTORS CHAIN INTERNATIONAL

[Original: English]

I. GENERAL COMMENTS

The Factors Chain International ("FCI") commends the UNCITRAL Working Group on International Contract Practices for the work achieved so far. The draft Convention on Assignment of Receivables ("the draft Convention") constitutes a balanced text which should facilitate, inter alia, factoring transactions. For this reason, FCI supports the work of UNCITRAL on this topic. As to the issues that remain pending, we would note the following.

II. SPECIFIC COMMENTS

Title

The following title of the draft Convention would seem to provide the clearest indication of its contents: "Draft Convention on Assignment of Receivables in International Commerce". If this were to be adopted, the definition of "Receivables Financing" in article 6 (c) should be omitted.

Scope of chapter V (article 1 (3))

We have no comment on the proposal to retain article 1 (3) which is at present in square brackets because we have in the past recommended the deletion of chapter V except for article 29 which should be moved to section II of chapter IV.

Assignments of receivables other than trade receivables (article 5)

As regards the exclusion of certain banking practices from some provisions of the draft Convention, we believe that the best way forward is the suggestion contained in A/CN. 9/466, para. 71 so that receivables other than trade receivables may be dealt with separately from trade receivables.

Definition of "location" (article 6 (i))

We have expressed serious reservations regarding the use of the place of central administration to define the location of an assignor with more than one place of business. We consider that for some small and medium sized enterprises that place may be difficult to determine. In spite of that reservation, in the absence of a more certain definition acceptable to the majority of the Working Group we would support a definition on the lines of article 6 (i) (A/CN.9/466, annex I). However, we consider it more logical that subparagraph (ii) of article 6 (i) should be as follows: "if the assignor has a place of business in more than one State, the place of

business is that place where the central administration is exercised". We do not see why the assignee should have to try to determine where the central administration of the assignor is exercised when the assignor has more than one place of business but all are in one State so that there is no doubt how subparagraph (i) will apply.

Conflicts with other international texts (article 36)

As regards the possible conflict with the proposed Unidroit draft Convention on mobile equipment, we understand that no provision would be made in the draft Convention so that the normal principles of treaty law would provide for the more specific and later Convention (i.e. Unidroit) to prevail.

Annex

We see no reason for the annex as it stands at present. Both regimes for the determination of priorities are less acceptable to us than that which gives priority to the assignee whose assignment is first notified to the debtor; that rule has worked generally in a satisfactory manner in all those jurisdictions in which the law is based on English law.

Registration may be a better system but it is unlikely to be adopted by some of the important trading states. Priority for the first assignment in time may have most unsatisfactory results for those who provide trade credit. If the annex is to be retained, then a third choice should be included.

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DRAFT CONVENTION ON ASSIGNMENT [IN RECEIVABLES FINANCING] [OF RECEIVABLES IN INTERNATIONAL TRADE]

Compilation of comments by Governments and international organizations

Addendum

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States

JAPAN

[Original: English]

Japan believes that the unification of laws concerning assignment of receivables is important from the point of a view that it would prevent complications arising out of differences of laws of various countries and promote international receivable financing. We are continuing a careful study of the draft Convention with a special attention to pending issues, including the issues of location (article 6 (1)), receivables other than trade receivables (article 5) and individual provisions concerning private international law. At this point, we would like to make brief comments on the issues as follows.

Title and Preamble

Japan is of the view that it is preferable that the words "receivables financing" remain in the title and the preamble, because the draft Convention contains rather detailed provisions as to obligations or defenses (Chapter IV, Sections I and II), which might not be always suitable for all kinds of assignment of receivables.

Scope of chapter V (articles 1 (3) and 37)

With a view to improving uniformity in the field of assignment law, it is preferable that the substantive priority rules in the annex do not apply through the private international law rules in chapter V. Therefore, Japan is of the opinion that article 1 (3) should be deleted and chapter V should have a provision stipulating explicitly that the chapter only supplements the draft Convention.

We prefer this chapter to be subject to an opt-in rather than to an opt-out clause (article 37 should be amended), because we understand that it is aimed at States that do not have such private international law rules.

Debtor's discharge by payment (article 19)

We would like to clarify article 19 (5), in particular with regard to the case in which A assigns a receivable to B, who assigns it to C subsequently, and the debtor requests C to provide adequate proof of the assignment.

One question is whether C needs to provide proof concerning the assignment only between B and C, or proof concerning both assignments so that C might be a true assignee. We believe that the latter might be proper considering that the debtor would not necessarily be notified of the assignment between A and B provided that article 18 (3) which states that notification of a subsequent assignment (in this case, between B and C) constitutes notification of any prior assignment (between A and B).

Another question is, if C fails to provide adequate proof of assignments, whether the debtor should pay A or B in order to be discharged.

UNITED STATES OF AMERICA

[Original: English]

I. GENERAL COMMENTS

The report of the 31st session of the Working Group (A/CN.9/466) and the consolidated text of the draft Convention, set out in Annex I thereto, provide a well negotiated basis on which to conclude a final international text of a United Nations convention on modern commercial finance law relating to the assignment of receivables ("the draft Convention"). The benefits of global economics and trade have not yet been fully realized in many states, and the absence of adequate international commercial finance and credit in this important area is one of the obstacles for achievement of these goals. The draft Convention can substantially cover that gap and thus benefit countries at all levels of economic development and in all regions.

Bulk assignments and assignments of future interests

The development of modern commercial finance law relating to the assignment of receivables through the draft Convention and the ability to generate credit from capital markets through such laws offer an important opportunity to address these goals. A multilateral convention can achieve these ends by recognizing the validity of and supporting the use of assignments of receivables, especially for future interests and large volume assignments, which have become the backbone of new sources of credit in international capital markets.

Commercial predictability as key to generating credits

In addition to including substantive uniform rules for the assignment of receivables, the draft Convention provides States with options in order to adapt the draft Convention's provisions to their particular economic needs. On some other matters the draft Convention sets out rules to determine which national legal regime applies, which can also promote finance, provided that the rules reflect transactional practice, serve the needs of commercial efficiency and are not counterproductively premised on general notions of conflict of laws. The combination of these techniques in the draft Convention is aimed at assuring the necessary level of commercial certainty, which is critical to the willingness of capital markets to extend credit to areas previously under-served.

II. SPECIFIC COMMENTS ON KEY ISSUES

Scope of application (article 1)

The draft Convention's standards on location of the assignor, the assignee and the debtor, and consistency of those standards with the equally important standards in articles 24 and 25, are critical to achieve benefits under the draft Convention. Financing parties in modern assignment practices must have ex-

ante certainty of when the draft Convention applies, and cannot be left generally to a later analysis of facts and circumstances, or the benefits of the draft Convention will be lost. This is especially the case with the major source of new credits through assignments which involve future interests, and bulk and syndicated assignments.

Article 1 (1) (b) needs to be aligned with article 1 (1) (a) so as to require for a subsequent assignment, like article 1 (1) (a) does for an initial assignment, that the assignor be located in a Contracting State. The rationale for the requirement in article 1 (1) (a) that the assignor be located in a Contracting State was that the rules of the draft Convention, especially those relating to third-party rights in part III of chapter IV, must apply to all third parties dealing with the assignor. This application could not be assured, particularly in the likely case of a dispute with a third party arising in a forum in the assignor's State, unless the assignor's State were a Contracting State. We see no policy reason to distinguish between initial assignments and subsequent assignments in requiring the assignor to be located in a Contracting State. We believe that the Working Group did not intend for there to be different treatment.

To align article 1 (1) (b) with article 1 (1) (a), we suggest that article 1 (1) (b) should read as follows:

> "(b) a subsequent assignment by an assignor located in a Contracting State at the time of the conclusion of the contract of assignment, provided that any prior assignment is governed by this Convention; and"

The assignment addressed in article 1 (1) (c) is not really a third type of assignment to which the draft Convention applies, as is suggested by the present wording, but rather this provision is a negation of a possible limitation that might otherwise have been made with respect to a type of assignment described in article 1 (1) (a). Therefore, this provision should be modified to be a new paragraph (2), reading as follows:

> "This Convention applies to a subsequent assignment that is described in paragraph (1) (a) of this article notwithstanding that this Convention did not apply to any prior assignment of the same receivable."

Scope of application (article 2 (a))

Article 2 (a) is in many ways a scope provision. This is because the definition of the term "receivable" in article 2 (a) - any contractual right to the payment of a monetary sum - is so broad that the draft Convention must address as a matter of scope, either by a rule in the draft Convention or by exclusion, a wide variety of financial practices that may involve the assignment or possible assignment of a receivable as so defined. The rules of the draft Convention generally work well, and are generally consistent with current commercial practices in many countries, when the receivable is a contractual right to payment arising out of the sale of goods or the provision of personal services.

The draft Convention does not work as easily in the case of other receivables, such as those arising out of deposit accounts, securities accounts, commodity accounts, swaps and other derivatives, repos, letters of credit, independent guaranties and the leasing of real estate. To increase the opportunity of the draft Convention to gain broad acceptance, certain rules may possibly need to be adjusted, or specific exclusions

provided, for those cases. It would be our hope that this goal could be achieved at the Commission meeting in June of 2000.

Excluded transactions (articles 4 and 5)

We continue to believe that proposals for exclusion of certain transactions or entities or negotiation of special provisions to accommodate those sectors, raised at the previous meeting of the Working Group, remain an important cross-cutting issue. Our proposal with respect to certain commercial sectors set forth at the last meeting of the Working Group in variant A of article 5 has been subsumed in our comments on article 2 (a) above. We continue our efforts to confer with industry groups to seek the appropriate solutions in this area.

"Location" (article 6 (i))

We are continuing to consult with industry groups in various countries and governmental regulatory authorities as to whether the rules for determining the location of an assignor in article 6 (i) should be modified for branches of banks. It is important to consider whether the location rule should take into account the common practice of banks to expand their foreign operations through branch banking. The separate regulatory scheme that many States have devised for branches of foreign banks operating in their States, and current debt syndication and trading markets in which banks and other parties, in dealing with each other, regard a regulated branch of a foreign bank much like a separate legal entity operating domestically in the State in which the branch is located *(for an initial proposal which the Working Group did not have time to consider, see A/CN.9/466, paras. 98 and 99)*. A similar treatment may be desirable for branch offices of foreign insurance companies where like regulatory considerations may be implicated.

Effectiveness and time of assignment (articles 9 and 10)

There are three situations in which these articles might be read to bring about a result different from that intended by the Working Group. First, despite the clear policy choice in article 9 to validate individual or bulk assignments of future receivables, article 24 might be interpreted so as to override the effect of that policy choice. Second, despite the clear policy in article 24 (a) (iii) of deference to the insolvency law of the state in which the assignor is located, articles 9 and 10 could be read to override that domestic insolvency law regarding priorities with respect to certain receivables arising after the commencement of the insolvency proceeding or earned after the commencement of the insolvency proceeding by the use of unencumbered assets of the insolvency estate. Third, despite the Working Group's clear intention to have no Convention rule that would override statutory limitations on assignment, article 9 might be interpreted to override an applicable statutory limitation on assignment of a receivable.

We offer a further explanation of our concerns and suggested language in the appendix hereto.

Priority in proceeds (article 26)

The text of article 26 should clarify that the assignee's proceeds interest is not superior to the interest of another assignee in the proceeds themselves if that other assignee's interest in the proceeds (in contrast to its interest in the receivable out of which the proceeds arose) would be superior under the law of the assignor's jurisdiction. To achieve this clarification, we would suggest adding to article 26 the following:

> "(3) Paragraphs (1) and (2) of this article do not affect the priority of the right of another assignee in the proceeds themselves if the other assignee's right in the proceeds would have priority under the law of the State in which the assignor is located."

Reservation as to sovereign debtors (article 38)

Insert "..., or any specified public entities or agencies," after "A State may declare at any time that it...". Because a complete exclusion would significantly limit the benefits of the Convention, it is important to allow States narrowly to tailor the proposed exclusion, if that is in their economic interest, rather than permit only an "all or nothing" choice of a complete exclusion. In some States, public entities are involved in a broad area of transactions.

Annex (sections I and II)

Transparency, a particularly important factor in modern capital markets, is implemented in some countries through the use of publicly accessible notice filing (registry) systems, which enable any financing party to be on notice of certain prior rights, and which generally establish priorities between certain claimants. This technique has proven to be a significant factor in expanding credit and lowering rates in those countries where it has been employed. The draft Convention appropriately does not require this technique to be adopted, but rather provides in Annex I, Sections I and II a fully optional approach, which any State can opt into at any time in order to obtain its benefits.

III. SPECIFIC COMMENTS ON OTHER ISSUES

Title

We recommend that the title be "Convention on Assignment of Receivables". The discussions at the Working Group have led us to the view that the term "financing" should be avoided so as to preclude arguments as to scope of application based on which transactions fall within the draft Convention solely because of the differing usages of that term.

Preamble

In order to reflect in the principles embodied by the preamble the purposes of this work as often discussed by the Working Group, we recommend that the language of the third paragraph be restated as follows:

"Desiring to establish principles and adopt rules relating to the assignment of receivables that would create certainty and transparency and promote modernization of law relating to assignments of receivables, including but not limited to assignments used in factoring, forfaiting, securitization, project financing, and refinancing, and that would facilitate the development of new practices without disrupting existing practices,...",

and that the following sentence be substituted for the fifth paragraph:

"Being of the opinion that the adoption of uniform rules governing assignments of receivables would facilitate the development of international trade and promote the availability of capital and credit at more affordable rates,..."

Application of the Annex (article 1 (4))

The language should be clarified to reflect the intention of the Working Group that "applies in" refers to the substantive law of the State whose law is being applied, rather than the law of a forum State in which an action may happen to be maintained.

"Location" (article 6 (i) (ii))

The commentary should clarify that "place of central administration" means the chief executive office, i.e. place from which the assignor or assignee manages its affairs, and not a place where books and records are kept or where assets are located. It is to be determined with a view to providing maximum certainty and predictability for those dealing with the assignor or assignee under the draft Convention.

Gap-filling (article 8 (2))

The last clause should be amended, or commentary added that clarifies that under this provision, the law applicable as determined by the draft Convention is first applied, and then as necessary the law applicable through general conflicts rules of that jurisdiction.

Effectiveness of assignment (article 9 (2))

In order to carry out the purposes of the article, the phrase "at the time a future receivable arises" should be substituted for "at the time of the conclusion of the original contract", which may have been inadvertently carried over from an earlier draft.

Liability for violation of contractual limitations (articles 11 (2) and 12 (3))

It is important to clarify the effect of the (identical) second sentences of each article, or alternatively restate them. Both provisions provide a rule negating liability in a specified circumstance. It is very important

to make clear that: the draft Convention itself does not create or provide a basis for liability of a person not a party to an anti-assignment agreement; the existence *vel non* of liability of such a person is left to national law; and the purpose, and the sole effect, of these provisions is to negate liability based solely on the ground of knowledge of the agreement, should that be a sufficient ground for liability under the applicable national law.

Security and supporting rights (article 12)

Article 12 refers in four instances to a right "securing" payment. This reference is intended to include personal rights such as a guarantee. Indeed, this is the type of personal right most likely to be the object of this provision. In some States, however, such as the U. S, a guarantee is not a form of security, as it is not a form of right in property; rather, it is, in such systems, a claim properly characterized as a "supporting" obligation. This point can be adequately dealt with by the commentary, making clear the inclusion of such personal rights within the meaning of the article, and, thus, that no change to the text of the draft Convention is required.

Notification of the assignment (article 19 and other appropriate articles)

The term "notification of the assignment" is a defined term and refers to a writing that satisfies certain requirements. As a result of differing interpretations by reviewers, references in the official commentary or a textual mark to indicate a defined term should be used to signal that reference is made to the defined term, and not to a general concept of notification, which could otherwise be misunderstood as meaning simply when the debtor learns of the assignment.

Debtor's discharge (article 19 (2))

Replace "notification of" with "notifications of assignment indicating to the debtor that". In view of the fact that the rule refers to the first notification received, it applies only when the debtor has received more than one notification.

Modification of the original contract (article 22 (3))

The article refers only to modifications agreed between the assignor and the debtor. Thus, there is no way an assignee can incur liability for such conduct. The article should be restated so as to be consistent with that.

Recovery of payments (article 23)

The reference to "and the debtor's rights under article 20" is unclear, and could lead to an erroneous interpretation. Article 23 refers to affirmative recovery while article 20 refers only to defenses and rights of set-off. The two provisions are, therefore, incompatible, and the "without prejudice" clause is potentially misleading. The phrase should be deleted. If, however, some reference is nevertheless deemed necessary, an

explanation in the commentary would be better. If the text is for some reason deemed necessary, a separate sentence to the following effect would be appropriate: "The debtor's inability to obtain an affirmative recovery under this article does not preclude the debtor's assertion of a defense or set-off in such amount if the debtor is otherwise entitled to do so under article 20."

Priority in proceeds (article 26 (2))

This provision should be revised to make clear that each competitor stands on its own footing. The present wording suggests that an assignee loses to each type of competitor unless it has priority over not only that type but also over all other types. The rewording should make explicit the relevant date for determining whether the condition has been met.

The commentary should make clear that the instructions referred to paragraph (2) (a) of article 26 may be given: at any time, whether at the inception of the assignment transaction or at a later time, such as the assignor's default; as part of the contract of assignment or in a separate document; in specific terms or in general language; and in writing, electronically or in any other manner that is capable of proof.

Law applicable to the relationship between the assignor and the assignee (article 28)

Subject to how this chapter finally reads, the bracketed language is important to avoid it being construed as an opening for an override of other provisions of the draft Convention, outside of chapter V, which determine applicable law.

Relationship with other texts (article 36)

If the bracketed language is retained, a separate exclusion may be necessary for those aircraft financing transactions in which the receivables are identified with and bound to particular aircraft or engines, in view of industry practices and special laws applicable to aircraft transactions in some States.

Additional exclusions (article 39)

This provision should be retained in order to permit adjustments necessary for States to implement the draft Convention's terms. Unnecessary use of this provision would adversely affect the credit ratings of parties within any State, so use of this provision is expected to be self-limiting.

Application of the annex (article 40)

In paragraph (1) (a), the term "will" should be replaced by "may", in line with the approach that use of the registration system is optional even for States that choose sections I and II, as indicated in paragraph (1) (b). States may wish to, and would be able to under this formulation, establish their own or use alternative

registries. Registries that do not operate efficiently and reliably will not draw credit, so this mechanism while preserving options is also self-correcting.

Transitional application issues (articles 41 (5), 43(3) and 44 (3))

The transition provisions are very important, and need to be further tested as to their effect on common paradigms of receivables practice. Commercial lenders need certainty that prior rights will be unaffected, and certainty as to at what point of time new transactions are covered by the draft Convention.

Registration-based priority provisions (Annex, articles 1 and 2)

This section should also be amended so as to permit States to provide by declaration further adjustments to articles 1 and 2 as to the manner in which such a notice-filing system is effected as to them.

Establishment of registry (Annex, article 3)

We are prepared to work informally at the Commission session or at any subsequent time with other States that are considering joining the new registration regime, in order to prepare the groundwork for internationally-linked notice-filing systems. We would at the same time oppose any provision which would unnecessarily raise costs of and make setting up such system(s) much more difficult, by requiring a diplomatic or other process unsuited to establishing a technical computer-based system. The experience of other international bodies is instructive in this regard. The preliminary draft Unidroit Convention, which will have as an integral part of its structure such a computer-based notice system, will include some brief guidelines, but will leave the establishment of the system to the contracting states after the preliminary draft Unidroit Convention is adopted. Further, as noted in comments to article 40 above, participation in any registry system is wholly optional, and would permit any State to substitute its own registry system, should it so choose.

Appendix

Explanation of comments on articles 9 and 10

Bulk and future assignments. Article 24 might be interpreted to override article 9's validation of bulk and future assignments. This could occur in cases in which the domestic law of the State in which the assignor is located does not recognize such an assignment and, thus, would find the assignment ineffective as against the claim of a competing party or would subordinate the rights of the assignee as against such a party. In those cases, the reference in article 24 to the law of the assignor's State to resolve competing rights of other parties might lead a court to apply that domestic law to reach the conclusion that the assignee of the future receivables has no rights with respect to such parties or is subordinate to them.

To avoid this possible interpretation, we suggest that article 9 be amended by adding the following language:

"(3) A transfer of a receivable is effective, as between the assignor and the assignee, at the time of transfer.

(4) A transfer of a receivable is not ineffective against and may not be subordinated to, a person described in paragraph (1) (a) (i) to (iii) of article 24, solely because law other than this Convention does not generally recognize an assignment described in paragraph (1) or (2)."

The Commentary could make clear that the word "generally" in proposed paragraph (4) is intended to refer to the general provisions of the commercial law of the assignor's country that does not recognize bulk assignments or assignments (whether individual or in bulk) of future receivables, and that the word "generally" is not intended to refer to more specific laws of the assignor's country that, for manifest policy reasons, prohibit the assignments of certain more narrow types or categories of receivables. For example, law prohibiting assignments of future wage receivables as a specific category of receivables would not be law that "generally" does not recognize present assignments of future receivables, because the law relates to only a specific type of category of receivables, not to receivables generically.

Domestic insolvency law on priorities for post-insolvency receivables. Articles 9 and 10 could be read to override the domestic insolvency law of the assignor's jurisdiction regarding priorities with respect to receivables arising after the commencement of the insolvency proceeding or earned after the commencement of the insolvency proceeding by the use of unencumbered assets of the insolvency estate. This interpretation could result from applying article 24's deference to matters settled elsewhere in the draft Convention to reach the conclusion that the time-of-transfer rules of article 10 override domestic insolvency laws addressing post-insolvency receivables. We do not believe that this interpretation was the intention of the Working Group. Rather, we believe that the intention of the Working Group, as generally indicated in article 24, was to defer to national insolvency law on the question of to what extent an assigned receivable arising after the commencement of the insolvency proceeding, or earned after the commencement of the insolvency proceeding by the use of unencumbered assets of the insolvency estate, could be set aside by or be subject to the interest of the insolvency administrator.

To avoid this interpretation, we suggest that article 9 be amended by adding the following language:

(_) Whether the transfer of a receivable affects the rights of a person described in paragraph (1) (a) (i) to (iii) of article 24 is determined in accordance with section III of chapter IV.

Statutory prohibitions on assignment. Article 9 might be interpreted to abrogate an applicable statute that limits assignment of a receivable by contract. This is because article 9 appears to render *all* contractual assignments "effective".

Addition of the following language to article 9 would preserve applicable statutory prohibitions on assignment without affecting the provisions of articles 11 and 12 addressing contractual prohibitions on assignments:

(_) This article is subject to any applicable statute that prohibits or limits the assignment of a receivable for a reason other than the existence of a contractual prohibition or limitation of such assignment.

Consolidated text. We offer the following language as a way to interrelate all three of our text suggestions with one another. The language accomplishing the interrelation is in italics.

Article 9. Effectiveness of bulk assignments, assignments of future receivables, and partial assignments

(3) A transfer of a receivable is effective, as between the assignor and the assignee, at the time of transfer.

(4) A transfer of a receivable is not ineffective against, and may not be subordinated to, a person described in paragraph (1) (a) (i) to (iii) of article 24, solely because law other than this Convention does not generally recognize an assignment described in paragraph (1) or (2).

(5) This article is subject to any applicable statute, other than a statute of the type described in paragraph (4), that prohibits or limits the assignment of a receivable for a reason other than the existence of a contractual prohibition or limitation of such assignment.

(6) *Except as otherwise provided in this article*, whether the transfer of a receivable affects the rights of a person described in paragraph (1) (a) (i) to (iii) of article 24 is determined in accordance with section III of chapter IV.

The italicized language is necessary to except (a) from the clause preserving any statutory prohibitions on assignment, a statute that generally prohibits individual or bulk assignments of future receivables, (b) from the clause requiring priority to be determined under section III of chapter IV, any law that, for purposes of priority, does not generally recognize individual or bulk assignments of future receivables, and (c) from the clause requiring priority to be determined under section III of chapter IV, the effect of any applicable statute that does not permit the assignment by contract of a specific type or category of receivable.

International organizations

INTERNATIONAL SWAPS AND DERIVATIVES ASSOCIATION (ISDA)

[Original: English]

ISDA (International Swaps and Derivatives Association, Inc.)1/ and TBMA (The Bond Market Association)2/ give their support to the arguments set out in the comments of the EBF (European Banking

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1/ ISDA is a global trade association representing more than 450 participants in the privately negotiated derivatives industry, a business which includes swaps, futures and options and combinations of these products relating to a variety of underlying financial and other risks, including interest rates and currency risks. A report of the Bank for International Settlements estimated the total outstanding notional value of four main categories of derivative transaction as at end December 1998 to be US$ 80 trillion and that these transactions had a gross market value at that time of US$ 3.2 trillion. For further information, see ISDA's website (www.isda.org).

2/ TBMA represents securities firms and banks that underwrite, distribute and trade fixed income securities domestically and internationally. These debt securities and related investments include: Repurchase

Federation) and the FMLG (Financial Markets Lawyers Group). 3/ ISDA and TBMA join the EBF and the FMLG in supporting the aims of the draft Convention. We are concerned, however, about the impact of certain aspects of the draft Convention on certain financial transactions and the contractual provisions underlying those transactions. These concerns are addressed in detail in the comments of the EBF. We support the proposals made by the EBF, with the additional point that we believe it would be appropriate to further narrow the definition of "trade receivable" in article 5, variant B of the EBF's proposed changes to exclude regular securities accounts, such as margin accounts, and debt securities generally.

The purpose of the draft Convention is to lower costs of borrowing and increase access to credit by reducing legal risks. It is important, however, that this goal be accomplished without adversely affecting existing, widely accepted contractual arrangements for certain categories of financial transactions, such as derivatives, repurchase agreements and securities lending arrangements. These transactions are a vital risk reduction tool for financial institutions, companies, governmental entities and other users. These transactions are most often documented under agreements sponsored or co-sponsored by ISDA or the TBMA. These agreements establish a means by which exposures under transactions are effectively netted on close-out. Anything that runs the risk of undermining the enforceability of netting under these agreements is a source of concern to ISDA, TBMA and our members.

ISDA and TBMA are grateful for the opportunity to comment on the draft Convention and are willing to assist UNCITRAL by commenting on any specific provisions as and when drafting is proposed by UNCITRAL.

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agreements; U.S. Treasury securities; Federal Agency securities; Mortgage and other asset-backed securities, Corporate Debt securities; Municipal bonds; and Money Market instruments. Further information concerning the Association may be obtained from TBMA's website (www.bondmarkets.com).

3/ See A/CN.9/472/Add.1.

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DRAFT CONVENTION ON ASSIGNMENT [IN RECEIVABLES FINANCING] [OF RECEIVABLES IN INTERNATIONAL TRADE]

Compilation of comments by Governments and international organizations

Addendum

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States

SINGAPORE

[Original: English]

I. GENERAL COMMENTS

As a developing country, Singapore strongly supports the preparation of this draft Convention which is designed to increase the availability of credit at lower cost. The availability of credit is often a critical factor in the development strategies of developing countries. Any initiative to enhance this is therefore to be welcomed. Singapore also notes and strongly supports the underlying principles of this draft Convention, viz. the requirements of internationality, the respect for party autonomy and the strong concerns over consumer and debtor protection. Fundamental to the proposals contained in the draft Convention is the principle that it should not adversely affect existing modalities of doing business and, especially, existing banking and financial practices. The draft Convention is designed to facilitate international trade, generate prosperity and improve the lives of people of the nations of the world in a manner consistent with international law. This principle should always be maintained.

II. SPECIFIC COMMENTS

Title

As the proposals contained in the draft Convention have now gone beyond merely addressing the assignments of receivables for the purpose of obtaining financing, the original title is no longer relevant. However, the draft Convention very clearly is now designed to address issues arising from assignment of receivables which arise from trading activities, and not all receivables. As such, the title "Convention on Assignment of Receivables in International Trade" is to be preferred.

Non-Contractual Receivables (article 2 (a))

Singapore would prefer to limit the scope of the draft Convention to contractual receivables. If the draft Convention is to extend to non-contractual receivables, then those other types of receivables should be carefully defined. They should not, under any circumstances, include tort receivables. To do so would be to encourage litigation and contravene the public policy of countries who are opposed to excessive litigation.

Limitations on assignment of receivables other than trade receivables (article 5)

It has become clear that various articles in the draft Convention would adversely affect established transactions in the banking and financial sectors. These provisions may also be

inconsistent with other United Nations Conventions. There is, therefore, an imperative that these established practices be either excluded totally from the ambit of the proposed draft Convention, or that it be carefully prescribed that certain terms of the draft Convention would not apply to them.

Of particular concern are articles 11 and 12. These articles affect a number of established practices in the banking and financial sectors. They would, for example, affect severely the established practice of "netting" in financial transactions. Singapore, therefore, prefers that transactions which may be adversely affected by the proposed draft Convention be excluded from its operation. In this regard, if a choice is to be made based on wording proposed by the Working Group. Variant B of the proposed article 5 would, with appropriate modifications, be preferred over variant A.

"Location" (article 6 (i))

It is of crucial importance that the location of a person be determined with certainty as location determines the applicable law. Failure to determine "location" with certainty undermines the draft Convention, since the entire purpose of the draft Convention, which is to enable certainty in the legal regime governing assignments of receivables, will be defeated. Singapore's clear preference would be for "location" to be determined by objective factors such as place of registration/incorporation, or place where the head office (if any) of a business is located. It is noted that many jurisdictions have established rules for the determining of "location" of a business entity and that it is not desirable to have different rules applicable for different purposes. The solution, therefore, is to attempt to arrive at a formulation which would enable the "location" of a party to be determined by the most objective and transparent factors which can be agreed upon. In this context, it is to be noted that even a concept such as "place of central administration" can often require subjective determination.

Special consideration must be attached to the "location" of branches of banks (including branches of financial institutions who do not qualify under the strict legal definition of "bank"). It is noteworthy that in many jurisdictions foreign banks can operate either as branches, in which case they operate under the same legal personality as the head office, or as separate legal entities incorporated under the law of that jurisdiction. Consideration should be given to whether these should be treated in a similar manner as regards the issue of their "location". The principle to be adopted in determining the "location" of these entities must be one which would not compromise existing realities in the commercial marketplace.

Public policy and preferential rights (article 25)

The phrase "*only if that provision is manifestly contrary*" in article 25 (1) is unclear and may be interpreted differently in different jurisdictions. This would lead to the draft Convention having different degrees of application in different forum States. Singapore prefers that this phrase be deleted and substituted with the phrase "*... if that provision is contrary ...*".

With regard to article 25 (2), States should be left with the option of depositing a declaration identifying preferential rights. To require States to make such a declaration would, for some States,

empower the public officials who are responsible for formulating and filing the declaration to, in effect, make a judicial determination as to what the order of priorities is for that jurisdiction. This may be notwithstanding that the order of conflicting "super-priorities" may not as yet have been judicially determined by the Courts of that jurisdiction. Conferring such powers on public officials would be contrary to the governmental structure for that jurisdiction.

Proceeds (article 26)

In line with the principle that the rules in the draft Convention should not adversely affect existing practices, it should be clearly provided that the rule in this article would not affect the rights of another person in proceeds of the assigned receivable under the law of the assignor's location. In addition to this, to avoid unnecessary complexity and confusion, it should be made clear that this article applies only to cash proceeds and not proceeds in other forms.

Application of chapter V (article 37)

Given that chapter V sets out principles, some of which are not recognised in all legal systems, it is preferable that States be given the choice to opt in rather than have to opt out of the application of this chapter.

Limitation to Government and other public entities (article 38)

This is an important provision for many Governments. The term "*... public entities ...*" is unclear and can be a source of uncertainty. It is not clear, for example, whether this would include State trading agencies which are separately incorporated, or government-linked companies. To address this, it is suggested that States be given an option to identify their "*public entities*" by filing declarations with the depositary.

Effect of denunciation (article 44 (3))

Article 44 (3) binds a State to the terms of the draft Convention even after it has denounced it. In the same way as a State can voluntarily bind itself to the terms of a multilateral convention, it should be able to free itself of the obligations created by such a convention when it feels constrained to do so. A restriction on this principle would render the draft Convention less attractive to States who subscribe strongly to it.

The commercial utility of a provision such as article 44 (3) in the scheme established by the proposed draft Convention cannot be disputed. To maintain the effectiveness of the draft Convention and also to enhance its attractiveness, an appropriate modality would be for this article to provide that a State may declare that, notwithstanding its denunciation of the draft Convention, the terms of the draft Convention shall continue to apply to transactions entered into when that State was a Contracting

State.

SECRETARIAT OF THE INTERNATIONAL INSTITUTE
FOR THE UNIFICATION OF PRIVATE LAW (Unidroit)
(additional comments)

Further to the comments regarding the relationship between the preliminary draft Unidroit Convention on International Interests in Mobile Equipment and the preliminary draft Protocols thereto, on the one hand, and the aforementioned draft UNCITRAL Convention, on the other hand, that it submitted on 14 February 2000 (published in A/CN.9/472/Add.1), the Unidroit Secretariat wishes to inform the Commission of the significant efforts made by the Third Joint Session of the Unidroit Committee of governmental experts for the preparation of a draft Convention on International Interests in Mobile Equipment and a draft Protocol thereto on Matters specific to Aircraft Equipment, and of the Sub-Committee of the ICAO Legal Committee on the study of international interests in mobile equipment (aircraft equipment), held in Rome from 20 to 31 March 2000, with a view to meeting the concerns expressed on that occasion by the representative of UNCITRAL, in particular as reflected in the comments submitted by that Organisation (UNIDROIT CGE/Int.Int./3-WP/10 ICAO Ref. LSC/ME/3-WP/10).

First, the substantive sphere of application of the draft Unidroit Convention on International Interests in Mobile Equipment (hereinafter referred to as "the draft Convention") was considerably reduced during the Third Joint Session, essentially with a view clearly to defining the number of categories of equipment requiring exclusion from the sphere of application of the draft UNCITRAL Convention: the only categories of equipment now covered by the draft Convention are airframes, aircraft engines and helicopters, railway rolling stock and space property (cf. Article 2 (3) of the draft Convention). The sphere of application of the draft Convention may thus no longer be described as being "open-ended" (cf. § 5 of the UNCITRAL Secretariat's aforementioned comments). It is submitted that it should accordingly be that much easier for the Commission to accommodate what the Unidroit Secretariat described as its preferred solution when submitting its comments in February, namely the express exclusion from the draft UNCITRAL Convention's sphere of application of the assignment of receivables that become associated rights in connection with the financing of those categories of equipment covered by the draft Convention.

The Unidroit Secretariat would moreover take this opportunity to reiterate the importance attached by the Unidroit Aviation, Rail and Space Working Groups to assignments of receivables taken as security in aircraft, rail and space financing transactions being dealt with in equipment-specific instruments, namely the draft Convention as implemented by the relevant draft Protocol, rather than in the draft UNCITRAL Convention.

Secondly, the question of the compatibility of Chapter IX of the draft Convention with the rule under certain legal systems that an assignment of associated rights carries with it the interest securing those rights to which the UNCITRAL Secretariat had drawn special attention in its comments was also dealt with by the Third Joint Session. A proposal was developed by three delegations containing two alternatives. Time did not permit the Joint Session to complete its consideration of this proposal. It was, therefore, decided to append it as an annex to the text of the draft Convention as

reviewed by the Drafting Committee. It is, however, our intention, hopefully in early September 2000, to convene a small working group made up of the Governments and Organisations (in particular UNCITRAL), having expressed particular interest in the question during the Third Joint Session, to complete the work in this respect commenced there. It is submitted that, once this work is completed, the concerns expressed by the UNCITRAL Secretariat in this regard will have been satisfactorily dealt with.

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